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No. 08-

IN THE

Supreme Court of the United States

ALVAN JOHNSON, *et al.*,
Petitioners,

v.

EDDIE JAMES LOWERY,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Under *Scott v. Harris*, 127 S. Ct. 1769 (2007), which prevents a plaintiff from defeating summary judgment by asserting facts plainly contradicted by the record, does appellate jurisdiction exist to review a denial of qualified immunity in a coerced confession case in which the plaintiff now contradicts his prior sworn testimony regarding the events surrounding his confession?

2. Does appellate jurisdiction exist to review a denial of qualified immunity on a fabrication of evidence or malicious prosecution claim if the defendants contest the materiality of any fact disputes?

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IN THE

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No. 08-__

ALVAN JOHNSON, *et al.*,
Petitioners,

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EDDIE JAMES LOWERY,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

Petitioners Harry Malugani, Douglass Johnson, Steve French, Larry Woodyard, and Alvan Johnson respectfully request that this Court grant the petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

OPINIONS BELOW

The Tenth Circuit's opinion (Pet. App. 40a-51a) is reported at 522 F.3d 1086 (10th Cir. 2008). The District Court's opinion (Pet. App. 1a-39a) is unpublished.

JURISDICTION

The Tenth Circuit issued its opinion on April 14, 2008. Petitioners filed a timely petition for rehearing

en banc. After the petition was filed, the Tenth Circuit issued an order directing the parties to brief the issue of whether this Court's decision in *Scott v. Harris*, 127 S. Ct. 1769 (2007), applied to this appeal. Pet. App. 52a-53a. After receiving those briefs, the Tenth Circuit ultimately denied the petition for rehearing en banc on June 17, 2008. Pet. App. 54a-55a. This Petition has been filed within ninety days of that date, as required by Supreme Court Rule 13.1. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 1291 provides that "the Court of Appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States."

STATEMENT

Federal appellate courts have jurisdiction under 28 U.S.C. § 1291 over an interlocutory appeal where the basis for the appeal is a denial of qualified immunity. *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985). In those circumstances, however, appellate review generally is limited to issues of law, and does not extend to claims in which the determination of qualified immunity depends on disputed issues of material fact. *Johnson v. Jones*, 515 U.S. 304 (1995).

In *Scott v. Harris*, 127 S. Ct. 1769 (2007), this Court held that a court reviewing a summary judgment motion based on qualified immunity is not required to accept a plaintiff's version of the facts when that version is plainly contradicted by other evidence in the record. This petition asks the Court to delineate the scope of that holding.

In this case, Respondent Eddie Lowery confessed to rape. Only three persons were present during the confession—Lowery and two police officers. The confession was not videotaped, but Lowery testified on three separate occasions during his underlying criminal prosecution about the details of the confession. The transcripts of Lowery' sworn testimony during his criminal case are the equivalent of the videotape in *Scott*, and tell a different story than the one Lowery now advances in this civil lawsuit seeking money damages nearly thirty years later.

In a similar vein, several appellate courts have held that jurisdiction exists to review the materiality of fact disputes raised in an appeal from the denial of qualified immunity. The Tenth Circuit's decision deviates from these holdings. The petition asks the Court to clarify whether a challenge to materiality is a proper question of law that can be raised in an interlocutory appeal from the denial of qualified immunity.

1. Arta Kroeplin was raped in her home in the small town of Ogden, Kansas during the early morning hours of July 26, 1981. Respondent Eddie Lowery, a 22-year-old soldier in the United States Army, was involved in a car accident at approximately 3:00 a.m. that same morning, only a few blocks from Kroeplin's residence. Pet. App. 117a. When Officer Malugani, one of the officers investigating the rape, learned of Lowery's accident, he contacted Lowery and asked if he could visit with him. *Id.* at 122a. Lowery agreed to come to the police station, but told Malugani he had no transportation. Malugani offered to pick up Lowery. *Id.* at 122a.

Lowery arrived at the police station shortly after 4:00 p.m. on July 27, 1981, and talked to Officers Malugani and Johnson in an interview room. He was not handcuffed. Pet. App. 143a. Lowery was read his *Miranda* rights by Officer Malugani and signed a waiver of rights form at 4:30 p.m. Pet. App. 123a. Officers Malugani and Douglass Johnson questioned Lowery for about 45 minutes to an hour. *Id.* at 59a. Following the interview, Lowery was taken back to his trailer. The officers asked Lowery if he could come back the next day at 8:00 a.m. and Lowery told them yes. *Id.* at 126a. Lowery told Officer Malugani that he might have to find a ride. Malugani replied, "If you can't find a ride, call me." *Id.* at 105a. At no time while Lowery was with the officers was he ever told he was under arrest. *Id.* at 126a.

After Lowery woke up on July 28, 1981, he went to a friend's house to see if he could borrow a car to get to the police station, but the friend had already left for work. Pet. App. 127a. Lowery returned to his trailer and called Officer Malugani and told him he had no transportation. Malugani told Lowery he would come by and pick him up. Officer Malugani picked up Lowery at 8:20 or 8:25 a.m. *Id.* at 127a. Lowery admits he voluntarily came to the police station on July 28, 1981. *Id.* at 105a.

The officers (Malugani and Douglass Johnson) read Lowery his *Miranda* rights, and Lowery signed a waiver of *Miranda* rights at 8:51 a.m. Pet. App. 128a. Lowery asked Malugani if he could see a lawyer. Malugani told him there was no need for one and that Lowery was not under arrest. *Id.* at 108a. Officer Raynor then administered a polygraph test to Lowery, which lasted from about 9:30 a.m. to about 12:30 p.m. *Id.* at 129a. Lowery concedes that even though he was read his *Miranda* rights before talking

to Officer Raynor, he was not under arrest. *Id.* at 146a. Lowery's polygraph exam indicated deception. *Id.* at 154a.

When Lowery finished talking with Officer Raynor, Officers Douglass Johnson and Malugani returned and took Lowery back to the interview room on the other side of the station. The officers questioned Lowery for approximately two and a half hours. Pet. App. 150a. Lowery admits he never asked the officers for food. *Id.* at 130a. Lowery confessed to committing the rape. *Id.* at 97a. He then repeated the confession a second time. *Id.* at 148a. The officers then took Lowery to a hospital where a blood sample was drawn. *Id.* at 138a. Enzyme testing of seminal fluid found at the rape scene revealed that Lowery's blood enzymes were consistent with those of the rapist. *Id.* at 176a.

2. Based upon Lowery's confession, the deception indicated by the polygraph, and the results of the blood test, Lowery was arrested and charged with rape, aggravated burglary and aggravated battery. Lowery was convicted of all three charges and served ten years in prison. In 2003, twelve years after his release from prison, DNA testing exonerated him from the rape. He then filed this action pursuant to 42 U.S.C. § 1983 naming the investigating officers, Harry Malugani and Douglass Johnson, as well as their supervisors, Larry Woodyard, Steve French and Alvan Johnson. He alleged claims of coercion, fabrication of evidence, malicious prosecution, failure to investigate, supervisory liability, and interference with the right of familial association.

3. The Petitioners filed a motion for qualified immunity on the coercion claim, contending that a reasonable officer could believe that Lowery's confes-

sion was voluntary under the factors set forth in *United States v. Erving, L.*, 147 F.3d 1240, 1248 (10th Cir. 1998). The Petitioners also moved for qualified immunity on Lowery's fabrication, failure to investigate, malicious prosecution, and supervisory liability claims, contending that a reasonable officer could believe that probable cause existed to arrest and charge Lowery. The district court denied Petitioners' motion for qualified immunity on Lowery's coercion claim, finding a significant factual disparity between the officers' recollection of events at the time of prosecution and now. Second, the court found that there were several versions of the nature of the questioning. Third, the court found that many of the questions were leading and included non-public facts. Pet. App. at 25a.

With respect to Lowery's fabrication claim, the court found that material factual disputes precluded summary judgment. Pet. App. 30a. As for Lowery's failure to investigate claim, the court ruled that based on the circumstances under which the confession was procured, Petitioners had an obligation to investigate other suspects. *Id.* at 33a. The court also denied the motion with respect to the malicious prosecution, conspiracy, and supervisory liability claims. *Id.* at 36a.

4. The Tenth Circuit affirmed the district court's denial of qualified immunity on Lowery's coercion, failure to investigate, fabrication of evidence and malicious prosecution claims. (The court reversed the district court's denial of qualified immunity on a First Amendment right of association claim.) The court found that the Petitioners contested the nature of and circumstances surrounding the questioning that led to Lowery's confession, as well as the extent

to which Lowery was in custody during the questioning. Pet. App. 48a. The court held "this amounts to a challenge to the sufficiency of the evidence, which presents a question of fact that we [the court] do not have jurisdiction to consider." *Id.*

Petitioners filed a petition for rehearing en banc. After the petition was filed, the Tenth Circuit issued an order directing the parties to address the impact of *Scott v. Harris*, 127 S.Ct. 1769 (2007), on the issue of the court's jurisdiction to review the denial of summary judgment. Pet. App. 52a-53a. After receipt of those briefs, the court voted to deny rehearing en banc, with Circuit Judge O'Brien voting in favor of en banc review. *Id.* at 54a-55a.

REASONS FOR GRANTING THE WRIT

A. There Is Uncertainty Over the Scope of This Court' Decision in *Scott v. Harris*, 127 S.Ct. at 1769, Regarding Whether Appellate Jurisdiction Exists To Review the Denial of Qualified Immunity When a Plaintiff's Version Of Events Is Contradicted By Reliable Evidence.

The petition implicates the scope of this Court's recent decision in *Scott v. Harris*, 127 S. Ct. at 1769. In *Scott*, this Court reversed the denial of qualified immunity on a Fourteenth Amendment substantive due process claim in a police pursuit case. The Court held that it was not required to credit the plaintiff's version of the facts when adjudicating the defendants' summary judgment motion because a videotape of the incident contradicted the plaintiff's version. *Id.* at 1775-76.

Federal courts have grappled with the issue of what evidence beyond a videotape satisfies the requirements of *Scott* and negates a purported fact dispute between a plaintiff and defendant. *See e.g., Blaylock v. City of Philadelphia*, 504 F.3d 405 (3rd Cir. 2007) (holding that similar photographs of persons who resembled the plaintiff in a false arrest case did not satisfy *Scott*); *Leary v. Livingston County*, 528 F.3d 438, 444 (6th Cir. 2008) (holding that a court will ignore allegations in a plaintiff's complaint when contradicted by sworn testimony); *Kelley v. Owens*, 2008 WL 313108 (M.D. Ala. February 1, 2008) (holding that *Scott* was satisfied by medical records that contradicted a plaintiff's claim of improper dental care); *Hart v. Celaya*, 548 F. Supp.2d 789, 804 (N.D. Cal. 2008) (holding that photographs satisfied *Scott* and contradicted plaintiff's claim that he was forced to kneel on hot asphalt).

The petition asks this Court to determine whether appellate jurisdiction exists to review the denial of qualified immunity on a coerced confession claim because Lowery has given prior sworn testimony describing the nature and circumstances surrounding the confession that is contrary to what he now alleges in a civil suit seeking money damages years later. Resolution of this issue is important to preserve Petitioners' right to obtain appellate review of their qualified immunity before being subjected to the burdens of suit, including discovery.

In a recent opinion authored by Judge Sutton, the Sixth Circuit emphasized that "[a] claimant may not create a triable issue of fact by saying one thing in a complaint and something else in a deposition." *Leary*, 528 F.3d at 444. In the present suit, twenty-five years after his criminal trial, Lowery now claims

he was deprived of food, Pet. App. 193a-94a, never volunteered that he busted down the screen door with his hands, *id.* at 192a, never volunteered that he picked up a knife in the kitchen, *id.* at 193a, never volunteered he heard a noise, went down a hallway and entered a bedroom, *id.* and never volunteered that the victim was wearing a nightgown. *Id.*

Lowery's testimony in the criminal case is the equivalent of a deposition. In 1981-82, and in some instances on more than one occasion, Lowery gave contrary sworn testimony in the defense of his criminal case:

- Lowery testified that he never requested food while at the police station. Pet. App. 130a;
- Lowery testified that in response to the question "Did you cut the screen?", he responded, "No, I just busted it down with my hands." *Id.* at 96a.
- Lowery testified that the officers asked, "Did you pick up anything?" and he responded, "Well, I picked up a knife." *Id.* at 111a.
- Lowery testified that the officers asked, "Well, what happened after that Lowery? Did you hear anything?" and he responded, "I heard a noise down the hall, and I told them I went down the hall and down the hallway into a bedroom." *Id.* at 97a.
- Lowery testified that Malugani asked him, "Well, what was she wearing?" Lowery responded that the victim was wearing a nightgown. *Id.* at 69a-70a.

Now that he seeks money damages, Lowery contradicts this prior sworn testimony in an effort to

create factual disputes to defeat qualified immunity and avoid appellate jurisdiction.

The district court offered three reasons for finding Lowery's confession involuntary. First, it stated that the findings of fact indicated a significant factual disparity between the officers' recollection of events then and now. Pet. App. at 25a. Second, the court found there were several versions of the nature of the questioning. *Id.* Third, the court stated that the findings of fact indicated that many of the questions were leading and included non-public facts. *Id.*

The first two reasons are erroneous because the Petitioners' testimony was irrelevant to their motion. Their motion was based entirely on Lowery's own sworn testimony, which cannot be controverted by Lowery anymore than the plaintiff could controvert the videotape in *Scott*. As for the third reason, appellate jurisdiction is proper to review the purely legal question of whether Lowery's version amounts to coercion. *See Mann v. Thalacker*, 246 F.3d 1092, 1100 (8th Cir. 2001) (holding that no coercion occurred even if the officer used some leading questions and prodded the suspect to be more forthcoming). The Tenth Circuit should have decided these legal issues.

The Tenth Circuit later held that Petitioners disputed the nature of and circumstances surrounding the questioning that led to Lowery's confession, as well as the extent to which Lowery was in custody during the questioning. Pet. App. 48a. The court characterized this as a challenge to the sufficiency of the evidence which presented a question of fact over which the court lacked jurisdiction. *Id.* at 48a. But the only facts before the court concerning the nature of and circumstances surrounding the confession

came from Lowery, because Petitioners invited the court to assume Lowery's version was true. The transcripts of Lowery's sworn testimony are the equivalent of the videotape in *Scott*. A court need only read those transcripts and decide whether Petitioners reasonably could have believed that Lowery's confession was constitutionally obtained.

Only three persons have direct knowledge of the details of the confession—Lowery, Officer Douglass Johnson and Officer Malugani. Petitioners placed the entire transcripts of Lowery's sworn testimony in the criminal case before the court and asked the court to accept those transcripts as the true version of events. To the extent that Lowery's version differed from the officers' version, the officers invited the court to accept Lowery's version as true. The officers asked the court to decide if any reasonable officer could have believed that Lowery's confession was voluntary. Lowery responded in turn by controverting 36 statements of fact taken from his own sworn testimony. Six of Lowery's denials of his own sworn testimony were adopted by the district court as findings of fact, providing the basis for the district court's denial of qualified immunity on the coercion claim.

If the interrogation had been videotaped, the case would fall squarely within the holding of *Scott v. Harris*, and appellate jurisdiction would exist despite the factual allegations Lowery now makes almost thirty years after the relevant events. In the absence of a videotape, the court has the next best thing—Lowery's own sworn accounts in 1981-82 of how the confession occurred. Those transcripts, which depict Lowery's contemporaneous recollection of the events of July 28, 1981, present a far different story than

Lowery now tells in this lawsuit. The following chart demonstrates the factual "revisions" Lowery is attempting to make in this civil suit for money damages and the district court's adoption of those revisions:

Lowery Version 1 (1981-82)	**Lowery Version 2** (2004)	**District Court Finding** (2006)
Lowery testified the officers asked him, "How did you get in?" "Did you cut the screen?" Lowery responded, "No, I just busted it down with my hands." (Pet. App. 96a)	Officers fed the detail to Lowery that he "busted open" a screen door with his hands. (Pet. App. 192a)	Court agrees with Lowery Version 2, and finds that the officers suggested to Lowery his answer that he told the officers that he busted the screen door down with his hands. (Pet. App. 9a)
"Well, what happened after that Lowery? Did you hear anything?" Lowery testified he responded, "I heard a noise down the hall." (Pet. App. 97a)	Officer fed the detail to Lowery that he heard a noise, and walked down a hallway. (Pet. App. 93a)	Court finds that the officers misrepresented to the prosecutor that Lowery volunteered, without any suggestion or leading on their part, that he heard a noise. (Pet. App. 10a)

Lowery Version 1 (1981-82)	Lowery Version 2 (2004)	District Court Finding (2006)
"Well, what happened after that Lowery? Did you hear anything?" And I told them, I go "I heard a noise down the hall, and I told them I went down the hall and down the hallway into a bedroom." (Pet. App. 97a)	Officers fed the detail to Lowery that he went down a hallway and into a bedroom. (Pet. App. 193a)	Court finds that the officers misrepresented to the prosecutor that Lowery volunteered, without any suggestion or leading on their part, that he went down the hallway and entered a room. (Pet. App. 11a)
Malugani asked, "What did you do?" And Lowery said I jumped on her, jumped on the bed. (Pet. App. 69a)	Officers fed the detail to Lowery that he jumped on the bed. (Pet. App. 193a)	Court finds that the officers misrepresented to the prosecutor that Lowery volunteered, without any suggestion or leading on their part, that he had jumped on the bed. (Pet. App. 11a)

Lowery Version 1 (1981-82)	Lowery Version 2 (2004)	District Court Finding (2006)
They (the officers) said, "Did you pick up anything?" And I go, "Well, I picked up a knife." (Pet. App. 111a)	Officers fed the detail to Lowery that he picked up a knife in the kitchen. (Pet. App. 193a)	Court finds that the officers misrepresented to the prosecutor that Malugani suggested to Lowery the detail about the knife with a leading question and Lowery merely repeated that detail back to Malugani and Johnson. (Pet. App. 16a)
He (Malugani) goes, "Well, what was she wearing?" Lowery told him that the victim was wearing a nightgown. (Pet. App. 69a-70a)	Officers fed the detail to Lowery that the victim was wearing a nightgown. (Pet. App. 193a)	Court finds that the officers misrepresented to the prosecutor that Mr. Lowery volunteered, without any suggestion or leading on their part, that the victim wore a nightgown. (Pet. App. 12a)

Lowery seeks to create the impression that the details of his confession originated with the Petitioners, rather than him. But the transcripts of his prior sworn testimony, like the videotape in *Scott*,

belie that position. For example, Lowery asserted that the Petitioners suggested the detail that he busted the screen door down with his hands. Lowery actually testified that the Petitioners asked him, "How did you get in? Did you cut the screen?" Lowery testified he responded, "No, I just busted it down with my hands." Pet. App. 96a. Lowery's answer contradicts (correctly) the Petitioner's question. The question "Did you cut the screen?" did not suggest to Lowery that he used his hands. But the district court gave credence to Lowery's 2004 story and found a material fact dispute existed as to whether the Petitioners suggested this fact to Lowery.

Lowery claims the Petitioners suggested that Lowery heard a noise down the hall, and walked down a hallway into a bedroom. Back in 1981, Lowery testified that in response to the question, "What happened after that Lowery? Did you hear anything?", he replied, "I heard a noise down the hall and I told them I went down the hall and down the hallway into a bedroom." Pet. App. 97a. The question "did you hear anything?" elicited Lowery's answer. The question is open-ended and cannot possibly suggest an answer. Despite Lowery's sworn testimony, the district court credited Lowery's 2004 story that the details of hearing a noise and going down a hallway into a room were suggested to Lowery by the Petitioners.

Lowery claims the Petitioners suggested the detail that he jumped on the victim's bed. In 1981, Lowery testified that the Petitioners asked him, "What did you do?" In response, Lowery testified he told the Petitioners he jumped on the victim, jumped on the bed. Pet. App. 69a. It is simply not possible to construe the question "What did you do?" as sug-

gesting to Lowery that he jumped on the bed. Despite Lowery's sworn testimony that he volunteered the detail, the district court gave credence to Lowery's 2004 version, in which he alleged the Petitioners suggested this detail to him.

Lowery asserts that the Petitioners suggested to him that he picked up a knife in the house. Lowery actually testified that the Petitioners asked him, "Did you pick up anything?", to which he responded, "Well, I picked up a knife." Pet. App. 111a. It is not possible to construe the question "Did you pick up anything?" as suggesting anything about a knife. But the district court credited Lowery's 2004 story and ruled that a genuine issue of material fact existed as to whether the Petitioners suggested to Lowery that he picked up a knife.

Lowery asserted that the Petitioners suggested that the victim wore a nightgown. Lowery actually testified that the Petitioners asked him, "Well, what was she wearing?" to which he responded that the victim was wearing a nightgown. Pet. App. 69a-70a. It is not possible to construe the question, "Well, what was she wearing?" as suggesting anything about a nightgown. Yet Lowery alleged, and the district court found, a genuine issue of material fact existed as to whether the Petitioners suggested the nightgown detail.

Scott does not permit a plaintiff to engage in such wholesale revisionism. When a plaintiff has previously given sworn testimony on the very events at issue in the current lawsuit, *Scott* directs the court to disregard the plaintiff's present story and view the facts as the plaintiff previously presented them under oath. Lowery should be bound by his 1981-82 story.

Federal appellate courts have consistently recognized that factual disputes do not preclude appellate jurisdiction, nowithstanding *Johnson v. Jones*, 515 U.S. 304 (1995), when a defendant asks the court to decide whether a constitutional violation occurred under the plaintiff's version of the facts. *Johnson v. Martin*, 195 F.3d 1208, 1214 (10th Cir. 1999); *Wilkins v. City of Oakland*, 350 F.3d 949, 951 (9th Cir. 2003); *Moniz v. City of Fort Lauderdale*, 145 F.3d 1278, 1281 (11th Cir. 1998) (holding that when the appeal is based on an assertion that, even accepting the plaintiff's version of the facts, the defendants are entitled to qualified immunity, the court has jurisdiction to review the denial of summary judgment interlocutorily); *Anderson v. Romero*, 72 F.3d 518, 520 (7th Cir. 1995) (noting that the presence of a factual disagreement does not necessarily preclude an appeal of a denial of immunity). Petitioners' appeal here was based on Lowery's own version of the facts—the version he swore to under oath back in 1981-82.

Lowery's prior sworn testimony cannot be reconciled with his current story. The sworn testimony Lowery gave nearly thirty years ago indicates that Lowery was not asked leading questions, as he now claims. A party should not be allowed to defeat summary judgment and appellate jurisdiction by altering their prior sworn testimony, just as the plaintiffs' inaccurate description of the police pursuit in *Scott* did not defeat appellate jurisdiction in light of the videotape of the actual events. For these reasons, appellate jurisdiction over the coercion claim is appropriate, and that claim should be remanded to the Tenth Circuit to decide whether qualified immunity shields the officers from liability.

B. Appellate Jurisdiction Exists Under the Collateral Order Doctrine to Review the Denial of Qualified Immunity When the Defendant Challenges the Materiality of Fact Disputes Between the Parties.

Materiality means that resolution of the fact disputes would affect the outcome of the case under the governing law. *Linbrugger v. Abercia*, 363 F.3d 537, 541 (5th Cir. 2004). Several federal appellate courts have held that questions as to the materiality of a factual dispute in a qualified immunity appeal are questions of law over which appellate jurisdiction is proper. *Tierney v. Davidson*, 133 F.3d 189, 194 (2nd Cir. 1998) ("Even where the lower court rules that material disputes of fact preclude summary judgment on qualified immunity, we may still exercise interlocutory jurisdiction if the defendant contests the existence of a dispute or the materiality thereof, or contends that he is entitled to qualified immunity even under plaintiff's version of the facts."); *Evett v. DETNTFF*, 330 F.3d 681, 686 (5th Cir. 2003) ("[T]he district court's determination that it cannot grant summary judgment because genuine issues of fact exist does not necessarily deprive this Court of jurisdiction. This Court may review the district court's conclusion that those disputed issues are material to the issue of qualified immunity."); *Turner v. Scott*, 119 F.3d 425, 428 (6th Cir. 1997) (holding the court had jurisdiction to review the denial of qualified immunity when defendant claims that asserted factual disputes are not material); *Tangwell v. Stuckey*, 135 F.3d 510, 515-16 (7th Cir. 1998) (holding appellate courts have jurisdiction "*to consider the legal question of whether a disputed fact is material.*") (emphasis in original); *Jeffers v. Gomez*, 267 F.3d 895, 905 (9th Cir. 2001) ("any issue of law,

including the *materiality* of the disputed issues of fact, is a permissible subject for appellate review.") (emphasis in original).

Unlike the coerced confession claim, Lowery's fabrication of evidence, failure to investigate, and malicious prosecution claims rest on evidence beyond Lowery's account of his confession. But the common legal element that runs through these claims is whether probable cause existed. Petitioners challenged the materiality of the alleged fabrications. If the differences between Lowery's version of events and the Petitioners' version would not defeat probable cause, then those differences are not material. The district court and the Tenth Circuit failed to conduct any analysis as to whether Lowery's alleged factual disputes were material. As Judge Wilkinson of the Fourth Circuit recently observed in granting a police officer qualified immunity in a § 1983 case, "[W]hile there may be genuine disputes, they are not over material facts; and while there may be disputes over material facts, they are not genuine." *Abney v. Coe*, 493 F.3d 412, 420 (4th Cir. 2007).

Petitioners do not present the classic "we didn't do it" defense that was raised in *Johnson v. Jones*. Rather, Petitioners' claim to qualified immunity rests on the argument that the differences between Lowery's sworn account of the events surrounding his confession and the officers' version are legally immaterial because they would not have altered the probable cause determination. *See, e.g., Taylor v. Meacham*, 82 F.3d 1556, 1562 (10th Cir. 1996) (affirming a grant of qualified immunity on the grounds that incorrect information contained in the sheriff's probable cause affidavit was not material). For example, Petitioners do not dispute, for purposes

of their motion, that they did not cease questioning Lowery after he invoked his *Miranda* rights on the morning of July 28, 1981. Their argument is that such a failure is not material because Lowery was not in custody and the Fifth Amendment right to counsel had not attached.

In this case, Petitioners challenge not whether the conduct occurred, but the legal significance of the conduct. *See Estate of Davis ex rel. McCully v. City of North Richmond Hills*, 406 F.3d 375, 379 (5th Cir. 2005) ("An officer challenges materiality 'when he contends that taking all the plaintiff's factual allegations as true no violation of a clearly established right was shown.'") The Tenth Circuit's failure to recognize Petitioners' argument and address the issue of materiality within its jurisdiction contradicts clearly-established precedent from the Second, Fifth, Sixth, Seventh and Ninth Circuits. This Court has not specifically addressed the availability of appellate jurisdiction over the denial of qualified immunity in situations in which a defendant contests the materiality of disputed facts. This case presents the Court with the opportunity to articulate the scope of appellate jurisdiction in such circumstances and resolve an apparent circuit split.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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September 11, 2008

APPENDIX

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

[Filed 09/15/2006]

Case No. 04-3101-JTM

EDDIE JAMES LOWERY and AMANDA MARIE LOWERY,
Plaintiffs,

vs.

THE COUNTY OF RILEY *et al.*,
Defendants.

MEMORANDUM AND ORDER

This matter comes before the court on the defendants' Motion for Qualified Immunity (Dkt. No. 56). Defendants also filed a separate Motion for Summary Judgment on State Law Claims (Dkt. No. 62), which defendant Riley County Law Enforcement Agency joined (Dkt. No. 77). The parties' briefs review a number of constitutional rights. Since defendants do not dispute that several of these rights were clearly established, the court will proceed directly to plaintiffs' burden of proof. After reviewing the parties' arguments, the court finds as set forth herein.

I. BACKGROUND

In 1981, Eddie James Lowery was convicted (after an initial hung, jury) of raping an elderly woman in her home. The first trial resulted in a hung jury with more than one juror recommending acquittal. Mr. Lowery spent more than ten years in prison and another ten years living under the stigma of being a

registered sex offender. Consistent with the victim's own account, the case was investigated as a single assailant crime, and there is no evidence that more than one perpetrator was involved. All of the evidence demonstrates that one assailant broke into the victim's home and raped her.

Mr. Lowery's conviction was based primarily upon a confession he allegedly gave to police investigators, defendants Malugani and Johnson.

II. STANDARD OF REVIEW

Summary judgment is proper where the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show there is no genuine issue as to any material fact, and that the moving party is entitled to judgments as a matter of law. Fed. R. Civ. P. 56(c). In considering a motion for summary judgment, the court must examine all of the evidence in a light most favorable to the opposing party. *Jurasek v. Utah State Hosp.*, 158 F.3d 506, 510 (10th Cir. 1998). The party moving for summary judgment must demonstrate its entitlement to summary judgment beyond a reasonable doubt. *Baker v. Board of Regents*, 991 F.2d 628, 630 (10th Cir. 1993). The moving party need not disprove the nonmoving party's claim or defense; it need only establish that the factual allegations have no legal significance. *Dayton Hudson Corp. v. Macerich Real Estate Co.*, 812 F.2d 1319, 1323 (10th Cir. 1987).

The party opposing summary judgment must do more than simply show there is some metaphysical doubt as to the material facts. "In the language of the Rule, the nonmoving party must come forward with 'specific facts showing that there is a *genuine issue for trial.*'" *Matsushita Elec. Indus. Co., Ltd. v. Zenith*

Radio Corp., 475 U.S. 574, 587 (1986) (quoting Fed. R. Civ. P. 56(e)) (emphasis in *Matsushita*). The opposing party may not rely upon mere allegations or denials contained in its pleadings or briefs. Rather, the opposing party must present significant admissible probative evidence supporting that party's allegations. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256 (1986).

In determining whether a material issue of fact exists, the court may not ignore an affidavit because it conflicts with the affiant's prior sworn statements. *Franks v. Nimmo*, 796 F.2d 1230, 1237 (10th Cir. 1986) (citations omitted). "In assessing a conflict under these circumstances, however, courts will disregard a contrary affidavit when they conclude that it constitutes an attempt to create a sham fact issue." *Id.* Relevant factors to establishing the existence of sham fact issues include "whether the affiant was cross-examined during his earlier testimony, whether the affiant had access to the pertinent evidence at the time of his earlier testimony or whether the affidavit was based on newly discovered evidence, and whether the earlier testimony reflects confusion which the affidavit attempts to explain." *Id.*

III. FINDINGS OF FACT

The findings of fact constitute the uncontroverted testimony of the parties. Where a fact is controverted, the court views it in the light most favorable to plaintiff. The testimony cited in the here are drawn from: 1) the hearing on Lowery's Motion to Suppress Confession held on November 12, 1981; 2) the testimony from Lowery's first trial held on November 19-20, 1981; and 3) the testimony from Lowery's second trial held on January 5-7, 1982.

Arta Kroeplin was raped in her home during the early morning hours of July 26, 1981.

Eddie James Lowery was involved in a car accident in Ogden, Kansas on the morning of July 26, 1981. The exact time of the accident is unclear. Mr. Lowery testified that he left his trailer at 3 a.m., and the police report reflects that the car accident occurred at 3:36 or 3:38 a.m.

A. Events of July 27, 1981

When Mr. Lowery returned home from work on Monday, July 27, 1981, he had a message to call Officer Harry L. Malugani. Mr. Lowery called Malugani, who asked Mr. Lowery if he could come down to talk to him or if Mr. Lowery could come up to the police station to talk to him. Mr. Lowery told Malugani he had no transportation, and Malugani offered to pick Mr. Lowery up. The officers came to pick Mr. Lowery up at approximately 4 p.m.

Mr. Lowery was not under arrest when Malugani and another officer, Douglass Johnson, came to his house and picked him up and took him to the police station. Mr. Lowery was placed inside an interview room at the Riley County Police Department. The interview room was a square room with a table in the middle with two chairs on each side. Mr. Lowery was not handcuffed. Officer Malugani read Mr. Lowery his Miranda rights, and Mr. Lowery signed a waiver of rights form at 4:30 p.m. on July 27, 1981.

Officers Malugani and Johnson questioned Mr. Lowery about the Kroeplin rape. Mr. Lowery was questioned for about 45 minutes to an hour. Mr. Lowery signed a waiver of search at 5:48 p.m. After Mr. Lowery signed the waiver of search form, he was

taken out of the interview room and taken back to his trailer in Ogden.

After the officers completed their search, they asked Mr. Lowery if he could come back the next day at 8 a.m., and Mr. Lowery told them yes. Mr. Lowery told Malugani that he might have to find a ride. Malugani replied, "If you can't find a ride, call me." (First Trial Tr. 41:21-42:1, Nov. 19-20, 1981.)[1] At no time while Mr. Lowery was with either Officer Malugani or Johnson was Mr. Lowery ever told he was under arrest.

B. Events of July 28, 1981

After Mr. Lowery woke up on July 28, 1981, he went to a friend's house to see if he could borrow a car to go down to the police station, but the friend had already left for work. Mr. Lowery returned to his trailer and called Officer Malugani and told him he had no transportation. Officer Malugani told Mr. Lowery he would come by and pick him up. Officer Malugani picked Mr. Lowery up at 8:20 or 8:25 on the morning of July 28, 1981. Mr. Lowery voluntarily came to the police station on July 28, 1981.

Mr. Lowery was taken to the Riley County Police Department and placed in another interview room. Mr. Lowery was read his Miranda rights and signed a waiver of Miranda rights at 8:51 a.m. Mr. Lowery is a high school graduate and knows how to read.

Mr. Lowery asked Malugani if he could see a lawyer and Malugani told him that there was no need for one right now, the officers just want to ask him questions, and that Mr. Lowery was not under

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[1] Testimony of Mr. Lowery at his first trial, Dkt. No. 67, Ex. B.

arrest. Plaintiff alleges that this conversation occurred only after the defendant officers had intensely interrogated him.

Mr. Lowery spoke with Officer Allen Raynor from about 9:30 a.m. to about 12:30. During this time, Officer Raynor administered a polygraph test on Mr. Lowery and subsequently interrogated him. The polygraph examination took place in the juvenile detention facility recreation room. Although Officer Raynor acknowledges that polygraph examination result reports were maintained pursuant to department procedures, the results relating to Mr. Lowery's polygraph examination are missing from the police files and defendants have no explanation for the missing files. However, defendants note that the record indicates that a copy of the polygraph examination had been provided to Mr. Lowery's attorney at the time of his trial.

Officer Raynor read Mr. Lowery his Miranda rights. Mr. Lowery was not under arrest while talking to Officer Raynor. Mr. Lowery did not make any kind of admissions to Officer Raynor.

After Officer Raynor conducted the polygraph test and interrogation, Officers Johnson and Malugani took Mr. Lowery back to the interview room on the other side of the station.

Mr. Lowery never requested food while at the police station and never told Officers Johnson and Malugani that he was hungry. At the same time, neither defendants offered Mr. Lowery anything to eat during his interrogation and confession on July 28.

Mr. Lowery testified at his jury trial in the District Court of Riley County that he just made up a

confession and told Officers Malugani and Johnson. However, Mr. Lowery clarifies that he could not have made up some of the specific details because only the perpetrator, victim and police officers could have known these details since they were non-public facts. Malugani and Johnson admit that guessing one precise detail, let alone each precise detail concerning the manner in which the crime occurred and relating them to the officers the way they claim the statement was made is virtually impossible. Officers Malugani and Johnson both admit that only someone present or someone who was fed the facts could have known such details.

Plaintiff provided a lengthy objection to the events on the morning of July 28, 1981. The key issues Mr. Lowery raises are whether he was improperly questioned after he was Mirandized and whether he requested an attorney. Officers Malugani and Johnson read Mr. Lowery his Miranda rights, and Mr. Lowery signed a waiver at 8:51 a.m. Although Malugani and Johnson now deny questioning Mr. Lowery between his being Mirandized and the polygraph test at 9:30 or 9:45 a.m., Mr. Lowery testified that he was questioned intensely during this time period. In prior testimony, Johnson admitted that he questioned Mr. Lowery for ten or fifteen minutes during this 54-minute interval after he was Mirandized, though he cannot now recall the tenor of his questions. At the same time, Johnson testified that no interrogation took place during that 54-minute period because of a clear and firm department policy barring the interrogation of suspects or potential suspects immediately before a polygraph examination, though he could not provide evidence of such policy. Malugani testified that he was free to interrogate Mr. Lowery during that 54-minute period

but did not because he had nothing more to talk to him about.

Plaintiff maintains that he requested an attorney before the polygraph test. However, Officers Malugani and Johnson testified in conversations with the prosecutor, at the suppression hearing, at trial and at their depositions that Mr. Lowery never requested an attorney prior to making his statement about the crime.

Mr. Lowery told Officers Malugani and Johnson that he stopped in front of somebody's house. Again, Mr. Lowery clarifies that he could not and did not tell the officers he stopped in front of someone's house because he was not aware of these non-public facts. Rather, he adopted the questions and agreed with the officers' suggestions as to the details of the crime. Officers Malugani and Johnson represented that Mr. Lowery volunteered information about stopping in front of a house in their official report, in their communications with the prosecutor before their testimony, at pretrial hearings, at trial, and most recently during their depositions.

Officers Malugani and Johnson asked Mr. Lowery what he did after he stopped at the house. Mr. Lowery told the officers he went to the front door. Even though My Lowery stated he went through the front door, the officers wrote in their reports that Mr. Lowery went through the back door and that Mr. Lowery volunteered this information. Although the officers now take the position that Mr. Lowery entered through the front door, the officers repeated their original account of events in their communication with the prosecutor, during their testimony at the hearing and trial, and most recently during their depositions.

After responding to the suggestion that he had gone up to the door, Mr. Lowery stopped talking because he did not know any information about the crime. Officers Malugani and Johnson continued questioning him, promising to get him help if he told them how he got in the house. The officers asked Mr. Lowery, "How did you get in the house? Did you cut the screen door or bust it open and pull the screen back?" (Second Trial Tr. 259:8-10, Jan. 5-7, 1982.)[2] In response to the question, which included non-public facts, Mr. Lowery told the officers that he busted the screen door down with his hands. Mr. Lowery said this because "it sounded like the thing to say." (First Trial Tr. 28:14-15, Nov. 19-20, 1981.)

Mr. Lowery adds that he made the statement, so he could get the lawyer he already requested. Although Malugani and Johnson admit for the first time in this motion that Lowery requested a lawyer, Malugani and Johnson lied to the prosecutor before the hearings and trial, at the hearings and trial, and in their depositions in this case when they vehemently denied that Mr. Lowery ever requested a lawyer before he confessed.

Mr. Lowery then told the officers he busted the front door down and went inside the living room. Mr. Lowery told the officers he proceeded into the kitchen. Mr. Lowery stated he was rumbling around in the living room and the kitchen, which he now clarifies he could not have done since he was never inside the victim's home. Mr. Lowery based his statement about his entry into the house on the floor plan of his own trailer. Although Malugani and

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[2] Testimony of Mi. Lowery at his second trial, Dkt. No. 67, Ex. C.

Johnson admit for the first time that Mr. Lowery told them he entered through the living room, they misrepresented this fact in their report, to the prosecutor, at hearings and trial and in their depositions, saying instead that he told them he entered through the kitchen.

The officers asked Mr. Lowery, "Were you going to burglarize the house or something?" (First Trial Tr. 49:13-17, Nov. 19-20, 1981.) Mr. Lowery replied, "Yeah." (First Trial Tr. 49:13-17, Nov. 19-20, 1981.)

The officers asked Mr. Lowery, "Did you hear a noise?" (Second Trial Tr. 260:20-21, Jan. 5-7, 1982.) Mr. Lowery replied, "Yeah. I heard a noise." (Second Trial Tr. 260:19-20, Jan. 5-7, 1982.) Again, Mr. Lowery clarifies that he could not have known about the noise without the officers' leading question. Although the officers now admit asking a leading question, Malugani and Johnson consistently represented at the pretrial hearings and at trial that Mr. Lowery volunteered—without any suggestion or leading on their part—that he heard a noise.

The officers asked Mr. Lower, "Where did [the noise] come from?" (Second Trial Tr. 260:20-21, Jan. 5-7, 1982.) ML Lowery replied, "Down the hall." (Second Trial Tr. 260:21, Jan. 5-7, 1982.) Malugani asked Mr. Lowery what caught his attention down the hall, and Mr. Lowery told Malugani that he heard somebody down the hall inside the room.

Malugani asked Mr. Lowery if he went down the hall and Mr. Lowery said yes. Malugani asked Mr. Lowery, "Did you go into a room?" (Hearing Tr. 88:21, Nov. 12, 1981)[3] Mr. Lowery said he went into a

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[3] Testimony of MT. Lowery at his hearing on the Motion to Suppress Confession, Dkt. No. 67, Ex. A.

bedroom. Plaintiff notes that while the officers *now* admit asking leading questions, Officers Malugani and Johnson consistently testified at pretrial hearings and at trial that Mr. Lowery volunteered—without any suggestion or leading on their part—that he went down the hallway and entered a room.

The officers asked Mr. Lowery, "Did you see anybody laying on the bed or anything?" "Did you jump on the bed or anything?" (Second Trial Tr. 261:8-10, Jan 5-7, 1982.) Mr. Lowery replied, "Well, I jumped on the bed." (Second Trial Tr. 261:10, Jan. 5-7, 1982.) Plaintiff notes that Malugani and Johnson now admit for the first time that Mr. Lowery was provided this information and simply repeated it back to the officers. Though they *now* admit asking leading questions, Malugani and Johnson consistently testified in their initial report, in their communications with the prosecutor, at pretrial and suppression hearings, at trial, and most recently during their depositions that Mr. Lowery volunteered—without any suggestion or leading on their part—that he had jumped on the bed.

Malugani asked Mr. Lowery, "Did you throw a pillow over her face or covers over her face?' (Second Trial Tr. 278:8-9, Jan. 5-7, 1982.) Mr. Lowery responded, 'I threw covers over her face." (Second Trial Tr. 287:9-10, Jan. 5-7, 1982.) Again, Mr. Lowery claims he could not have volunteered this fact because he was never at the scene. Malugani and Johnson now admit for the first time that Mr. Lowery was provided this information and simply repeated it back to the officers. Though they *now* admit asking leading questions, Malugani and Johnson consistently stated in their initial report, in their communications with the prosecutor, at pretrial and sup-

pression hearings, at trial, and most recently during their depositions that Mr. Lowery volunteered—without any suggestion or leading on their part—that he had thrown covers over the victim's face.

Malugani then asked Mr. Lowery, "What did you do? Did you hit her with a vase or with the butt of a knife?" (Second Trial Tr. 262:2-3, Jan. 5-7, 1982.) Mr. Lowery responded, "I hit her with the butt of a knife." (Second Trial Tr. 262:2-3, Jan 5-7, 1982.) Malugani and Johnson now admit for the first time that Mr. Lowery was provided this information and simply repeated it back to the officers. Though they *now* admit asking leading questions, Malugani and Johnson consistently stated in their report, in their communications with the prosecutor, at pretrial and suppression hearings, at trial, and most recently during their depositions that Mr. Lowery volunteered—without any suggestion or leading on their part—that the victim had been hit with the butt of a knife.

Malugani asked Mr. Lowery, "Well, what was she wearing?" (Hearing Tr. 89:22, Nov. 12, 1981.) Mr. Lowery responded that the victim was wearing a nightgown. Malugani asked Mr. Lowery if the victim was wearing underwear or not Mr. Lowery told Malugani that the victim was wearing underwear. Malugani and Johnson still deny asking Mr. Lowery leading questions suggesting non-public information about the victim's nightgown, and that he simply repeated this information back to the officers. Defendants consistently stated in their report, in their communications with the prosecutor, at pretrial and suppression hearings, at trial, during their depositions, and again here, claiming that Mr. Lowery

volunteered—without any suggestion or leading on their part—that the victim wore a nightgown.

Malugani asked Mr. Lowery, "Well, what happened after that?" (Second Trial Tr. 262:9, Jan. 5-7, 1982.) Mr. Lowery responded, "Well, I raped her." (Second Trial Tr. 262:9-10, Jan. 57, 1982.) Mr. Lowery next told the officers he left the house. When Mr. Lowery finished his confession, he asked the officers for and they gave him a fifteen-minute break and brought in a cup of coffee. The officers came back about fifteen minutes later and asked Mr. Lowery to write a statement out for them and advised him, "If you don't want to write a statement, would you say it into a recorder if that would be easier." (Second Trial Tr. 264:15-18, Jan. 5-7, 1982.) Mr. Lowery responded that he didn't want to say anything else and wanted to see a lawyer.

After the questioning, the officers took Mr. Lowery back to his trailer in Ogden. Malugani and Johnson wanted to go back to the trailer to pick up the shirt Mr. Lowery was allegedly wearing at the time of the rape.

After the officers obtained the shirt, they took Mr. Lowery to Saint Mary's Hospital to draw blood from Mr. Lowery. Mr. Lowery isn't sure if Officer Malugani placed him under arrest after the statement or after they got back from Mr. Lowery's trailer. Mr. Lowery was taken to the jail about 4:20 and was actually booked at 4:37.

The entire chain of events from the time Mr. Lowery finished speaking with Officer Raynor until he was placed in jail lasted from about 12:45 p.m. to 4:37 p.m.

Mr. Lowery confessed to the rape "because he felt that he couldn't leave and if he did leave Investigator Malugani was just going to keep on getting all over him until he proved that Mr. Lowery was the one that did this." (Second Trial Tr. 263:23-264:4, Jan. 5-7, 1982.) Mr. Lowery made up the whole story just so the officers would leave him alone and get off his back. Mr. Lowery constructed the details of his confession by using his own imagination. Again, plaintiff clarifies that he had been promised verbally and in writing that if he at any time wanted to speak to a lawyer, one would be provided him. Mr. Lowery states that Malugani and Johnson refused him an attorney. Although Malugani and Johnson admit for the first time in this motion that Lowery requested a lawyer, Malugani and Johnson lied to the prosecutor before the hearings and trial, at the hearings and trial, and in their depositions in this case when they denied that Mr. Lowery ever requested a lawyer before he confessed.

At the time of the rape, Mr. Lowery was 22 years old and employed by the United States Army as an Sp-4. He was also married.

Prior to trial, the Riley County District Court denied Mr. Lowery's motion to suppress and found "the admissions given by this defendant were voluntarily made and were not a result of coercion, duress or unfairness on the part of the officers conducting the interrogation." (Hearing Tr. 116, Nov. 12, 1981). The Kansas Court of Appeals affirmed Mr. Lowery's conviction and held his confession was not involuntary. However, the District Court of Riley County, Kansas, Case No. 81 CR 575, exonerated Mr. Lowery and vacated his conviction on April 3, 2003,

causing the prior findings of fact and rulings to lose all binding and preclusive effect.

C. Officers' Report and Subsequent Testimony

After the interrogation and confession of Mr. Lowery, Johnson drafted an official report documenting the alleged confession. Although Johnson drafted the report, it would have been reviewed by both detectives and both detectives adopted it as their own. In the report, the detectives represented that Mr. Lowery had volunteered non-public information. Malugani and Johnson understood they had an obligation to complete this report accurately and honestly. It was the usual practice for officers to meet with the prosecutor before the hearings and trial. Patrick Caffey recalls meeting with both Malugani and Johnson and making clear that the officers did not feed Mr. Lowery any salient facts. Although Malugani and Johnson do not recall specifically meeting with the prosecutor, they believe they did so as it was the usual practice.

Both Malugani and Johnson testified under oath that they did not suggest or feed any non-public details about the crime to Mr. Lowery while they were interrogating him, that Mr. Lowery knew non-public information about the crime and volunteered it, and that only the perpetrator could have known such information. Further, Malugani and Johnson claimed they did not ask Mr. Lowery any leading questions suggesting non-public facts other than the ones relating to the screen door. They repeated this testimony in their initial report, in their communications with the prosecutor, at pretrial and suppression hearings, at trial, and most recently during their depositions.

Mr. Lowery stated that Malugani and Johnson fed him facts through leading questions suggesting non-public facts and pressured him into repeating them throughout the interrogation.

Malugani and Johnson testified under oath that Mr. Lowery told them, without any prompting or suggestion, that he pulled up to a white house on the corner. They repeated this testimony at trial and most recently during their depositions. Malugani and Johnson both admit that only someone present or someone who was fed the facts could have known such details as the color or location of the house. At his first trial, Mr. Lowery stated he was fed the fact relating to pulling up to a house on the corner, and he merely repeated that detail back to the officers. At the second trial, Mr. Lowery stated he only learned of the color of the house during the trial.

Malugani and Johnson testified under oath that Mr. Lowery told them, without any prompting or suggestion, that he then went into the kitchen, saw a knife, and picked it up. Officer Johnson testified he represented in his initial report, in his communications with the prosecutor, at pretrial and suppression hearings, at trial, and most recently during his deposition that Mr. Lowery volunteered this information without any prompting. Malugani and Johnson both admit that only someone present or someone who was fed the facts could have known such details. At the suppression hearing, Mr. Lowery testified that Malugani suggested to him the detail about the knife with a leading question and he merely repeated that detail back to Malugani and Johnson.

Malugani and Johnson testified under oath that Mr. Lowery told them, without any prompting or

suggestion, that after he had raped the victim, he threw the knife down inside the residence and fled the area. They repeated this testimony in their initial report, in their communications with the prosecutor, at pretrial and suppression hearings, at trial, and most recently during their depositions. Malugani and Johnson both admit that only someone present or someone who was fed the facts could have known such details.

Both Malugani and Johnson recognize that Mr. Lowery could not have known the aforementioned non-public details about the crime unless he was present or participating or he was fed those facts.

Johnson testified under oath that Mr. Lowery indicated he was giving his statement to Malugani and him, that he was ashamed and afraid his family would think poorly of him. Johnson repeated this testimony at trial, and most recently during his deposition. Mr. Lowery disputes the accuracy of Johnson's testimony and characterization of his behavior.

The prosecutor assigned to Mr. Lowery's case, Patrick Caffey, testified that Malugani and Johnson never told him that Mr. Lowery was fed facts relating to the crime and that Johnson's report indicated Mr. Lowery volunteered all such details. Malugani and Johnson's recollection of their interactions with the prosecutor corroborate his testimony.

Malugani testified that neither he nor Johnson ever shouted at Mr. Lowery or attempted to intimidate him. Malugani denied telling Mr. Lowery he had ten years left on the force and would take all of that time to prove his guilt if necessary. Mr. Lowery repeatedly testified that Malugani told him he had

ten years left on the force and would take all of that time to prove his guilt if necessary.

D. Officers Malugani and Johnson

Malugani was known at the RCPD as "Dirty Harry," a nickname he got from his partner while he was a police officer in Santa Rosa, California, prior to moving to Kansas. The nickname was taken from the movie by the same name in which Clint Eastwood played the title character, a rogue cop willing to break the rules and use brutal and illegal methods to catch or kill culprits. Alvan Johnson, director of the RCPD at the time of the Lowery investigation, as well as Woodyard and French, both supervisors and friends of Malugani, acknowledged that they knew that nickname was used by his co-workers and colleagues. Johnson, too, had a nickname, "Mad Dog," which he testified was used by supervisors such as French and colleagues on and off the job. Johnson's supervisors at the time of the Lowery investigation remember his nickname, too.

Malugani and Johnson drank and socialized with their immediate supervisors, Larry Woodyard and Steven French. Indeed, Johnson considered these supervisors to be his friends, and French considered both Malugani and Johnson as his friends.

According to Alvan Johnson, the director of the Riley County Police Department at the time of the Lowery investigation, both Malugani and Johnson had domestic problems requiring his involvement at that time. Johnson had gone through a divorce and was experiencing domestic problems, while Malugani had gone through several divorces in addition to experiencing domestic problems with his spouse at the time, fellow officer Jennifer Shay. Malugani's

problems were affecting his performance and required the involvement of his supervisors.

Although Johnson's supervisors had noticed problems with his work, in a letter to their superior, RCPD director Alvan Johnson, they noted increased activity on Johnson's part and commended him for singlehandedly improving the department's case clearance rates.

Alvan Johnson, the director of the Riley County Police Department at the time of the Lowery investigation, testified that under department policy it was routine for the supervisors to sign off on the reports as they were submitted and reviewed. He recognized that ongoing supervision is intended in part to communicate to subordinates that their work is evaluated on a regular basis, thereby forestalling violations of internal rules and of the rights of suspects and others.

In relation to a Supplemental Report signed by Douglass Johnson (Dkt. No. 108, Ex. Q), Alvan Johnson states that it was normal procedure for the supervisor to sign the report or the cover sheet. Not leaving any signature would be inconsistent with department policy and procedure. Woodyard contends that the very idea of a supervisor having to sign off on a subordinate's report to indicate review of his work was "foreign" to him. Woodyard's contention in this respect is at odds with the above-referenced testimony of his then-superior, Alvan Johnson, and that of his peer, French, who routinely initialed subordinates' reports to indicate review and stated that other supervisors in the RCPD did that too, using the boxes provided in report forms to that end.

The testimony cited is unclear as to whether there was a supervisor signature on the Supplemental Report. French's testimony states there was no signature indicating supervisor review. However, Woodyard testified that there was some notation at the top indicating that there may have been supervisor review, but Woodyard was unsure who was the supervisor.

IV. ANALYSIS

A. Qualified Immunity

Generally, the Eleventh Amendment shields from suit state officials acting in their official capacity. *Wares v. VanBebber*, 231 F. Supp. 2d 1120, 1124 (D. Kan. 2002). In enacting 42 U.S.C. § 1983, Congress did not intend to abrogate state immunity. *Neal v. Lewis*, 325 F. Supp. 2d 1231. 1235 (D. Kan. 2004). Thus, when state officials act in their official capacities, they are entitled to absolute immunity. *Id.* These officials are not considered "persons" within the meaning of 42 U.S.C. § 1983. *Id. citing Will v. Mich. Dept of State Police*, 491 U.S. 58, 66-71, 109 S.Ct. 2304, 105 L.Ed.2d 45 (1989).

Even when state officials act in their personal capacity, they may still receive qualified immunity to shield them from personal liability unless their conduct violates clearly established constitutional rights. *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982). The Tenth Circuit places a presumption in favor of immunity for public officials acting in their individual capacities. *Hidahl v. Gilpin County DSS*, 938 F. 2d 1150, 1155 (1991); *Schalk v. Gallemore*, 906 F.2d 491, 499 (l0th Cir. 1990); *Melton v. City of Oklahoma City*, 879 F.2d 706. 728-29 (10th Cir. 1989), *reh'g granted on other*

grounds, 888 F2d 724 (1989). The Supreme Court notes that "[a]s the qualified immunity defense has evolved, it provides ample protection to all but the plainly incompetent or those who knowingly violate the law." *Malley v. Briggs*, 475 U.S. 335, 341, 106 S.Ct. 1092, 1096, 89 L.Ed.2d 271 (1986).

To determine whether qualified immunity serves as a defense to a Section 1983 action, the court undertakes a two-step analysis. *PeTA, People for the Ethical Treatment of Animals v. Rasmussen*, 298 F.34 1198, 1207 (10th Cir. 2002) (citing *Saucier v. Katz*, 533 U.S. 194, 121 S.Ct. 2151, 150 L.Ed.2d 272 (2001)). First, the court must determine whether the facts alleged state the violation of a constitutional right. *Id.* And if so, the court must determine whether the constitutional right was clearly established at the time of injury. *Id.* If the answer to either of these questions is "no," then the defendant is entitled to qualified immunity. *Id.* Once a defendant asserts a qualified immunity defense, the plaintiff carries the burden of showing qualified immunity is not proper under the circumstances. *Despain v. Uphoff*, 264 F.3d 965, 971 (10th Cir. 2001).

1. Miranda and Section 1983 Actions

Defendants argue that plaintiff cannot state a violation of his Fifth Amendment right to counsel because such a claim does not give rise to a claim for damages under Section 1983. Plaintiff argues that defendants misconstrue his claim. Plaintiff concedes that no Fifth Amendment right to counsel claim can arise out of Section 1983. However, plaintiff claims that his action seeks recovery for a coerced confession used to convict Mr. Lowery at trial, which creates a Fourteenth Amendment violation falling within the

scope of Section 1983. Defendants respond that plaintiff's argument is fatally flawed, noting that one cannot convert a Miranda violation into a coercion claim. Specifically, if Mr. Lowery was not under arrest-, he cannot claim coercion.

As both parties acknowledge, no cause of action exists for money damages under Section 1983 where an officer allegedly violated a suspect's Miranda rights. *Bennett v. Passic*, 545 F.2d 1260, 1263 (10th Cir. 1976) ("No rational argument can be made in support of the notion that the failure to give Miranda warnings subjects a police officer to liability under the Civil Rights Act."). *See also Chavez v. Martinez*, 538 U.S. 760, 772, 123 S. Ct. 1994, 2004 (2003) (citations omitted) (noting that failure to read Miranda warnings did not violate the defendant's constitutional rights and cannot be grounds for a Section 1983 action). Plaintiffs attempts to reframe a Miranda violation into a coerced confession claim is of no avail. To the extent that plaintiff presents a Miranda violation under Section 1983, the court dismisses plaintiffs claim. Mr. Lowery's allegations of a coerced confession will be addressed in the next section.

2. Whether Mr. Lowery's Confession Was Voluntary

Whether plaintiff made a voluntary confession is the central issue in determining whether defendants are entitled to qualified immunity. Defendants initially argue that a reasonable officer could believe Mr. Lowery's confession was voluntary and that this confession provided probable cause. Defendants note that they have satisfied the factors considered in *United States v. Erving, L.*, 147 F.3d 1240, 1249 (10th

Cir. 1998). Plaintiff responds that defendants have violated Mr. Lowery's right against compelled self incrimination by fabricating evidence, providing perjured testimony, questioning Ms. Lowery over two days and coercing a confession. In their reply, defendants add that the timing and events related to Mr. Lowery's accident provided probable cause to question Mr. Lowery.

In determining whether a confession is voluntary, the Tenth Circuit evaluates "whether, under the totality of the circumstances, the challenged confession was obtained in a manner compatible with the requirements of the Constitution." *United States v. Erving, L.*, 147 F.3d 1240, 1248 (10th Cir. 1998) (citing *Miller v. Fenton*, 474 U.S. 104, 112, 106 S.Ct. 445, 88 L.Ed.2d 405 (1985)). The court considers: 1) the age, intelligence, and education of the defendant; 2) the length of any detention; 3) the length and nature of the questioning; 4) whether the defendant was advised of his or her constitutional rights; and 5) whether the defendant was subjected to physical punishment. *Id.* at 1249 (citation omitted). The Supreme Court has elaborated on this standard noting that "coercive police activity is a necessary predicate to the finding that a confession is not 'voluntary' within the meaning of the Due Process Clause of the Fourteenth Amendment." *Id.* (citing *Colorado v. Connelly*, 479 U.S. 157, 167, 107 S.Ct. 515 (1986). The crucial element is police overreaching, and after *Connelly* a confession is only involuntary under the Fourteenth Amendment if the police use coercive activity to undermine the suspect's ability to exercise his free will. *Id.* (citing *Connelly*, 479 U.S. at 163, 107 S.Ct. 515).

For claims of coerced confessions, the court looks to whether a reasonable officer in defendants' position could have believed the confession was voluntary. *See Storck v. City of Coral Springs*, 354 F.3d 1307, 1315 (11th Cir. 2004) (noting that arguable probable cause for arrest exists based in light of the information the officer possessed). The distinction is crucial and goes to the heart of the qualified immunity doctrine. *Jones v. Cannon*, 174 F.3d 1271, 1283 n. 3 (finding in the context of a warrantless arrest "arguable probable cause, not the higher standard of actual probable cause, governs the qualified immunity inquiry."). "The concern of the immunity inquiry is to acknowledge that reasonable mistakes can be made as to the legal constraints on particular police conduct." *Saucier v. Katz*, 533 U.S. 194, 201 (2001). "Even law enforcement officials who 'reasonably but mistakenly conclude that probable cause is present' are entitled to immunity." *Hunter v. Bryant*, 502 U.S. 224, 227 (1991). Only when officers' conduct falls outside the bounds of what a reasonable officer would consider constitutional do they forfeit their entitlement to immunity. *See Ray v. Inhabitants of City of Lewiston*, 42 F.3d 691, 695 (1st Cir. 1995) (one of the cardinal purposes of immunity is to offer the police "a fairly wide zone of protection in close cases.").

Although defendants ask the court to focus on plaintiff's age, education, the length of the detention and the fact plaintiff had been advised of his constitutional rights, this is merely examining form rather than function. It is evident that Mr. Lowery had a high school education and was 22 years of age at the time of his confession. However, he underwent two days of questioning where he claims he evoked his right to counsel, which the officers ignored.

Several factors counsel in favor of finding Mr. Lowery's confession was involuntary. First, the findings of fact indicate that there is significant factual disparity between the officers' recollection of events at the time of prosecution and now. Mr. Lowery indicates that he invoked his right to counsel, though the officers initially denied this fact and now appear to admit this. Second, there are several versions of the nature of the questioning. The tenor of the conversation is unclear as defendants' account of the conversation has varied in the suppression hearing, the first trial, the second trial, and the deposition. Third, the findings of fact indicate that many of the questions were leading and included non-public facts. Given the number of specific facts that had to be fed to Mr. Lowery about the rape, no reasonable officer could believe that Mr. Lowery's confession was voluntary. This is not an instance of reasonable mistake or arguable probable cause, but rather an instance where law enforcement misled Mr. Lowery, the prosecution and the courts. Such action is not entitled to immunity. No number of Miranda waivers should shield an officer from illegal and unethical conduct.

3. Complaining Witness & Immunity

The issue of immunity is further complicated by the stage of the proceedings and the status of the defendant. In general, "the common law provided absolute immunity from subsequent damages liability for all persons—governmental or otherwise—who were integral parts of the judicial process." *Briscoe v. LaHue*, 460 U.S. 325, 335, 103 S.Ct. 1108, 1115-1116 (1983). Although a party may bring a civil rights claim, Section 1983 "does not authorize a damages claim against private witnesses on the one hand, or

against judges or prosecutors in the performance of their respective duties on the other." *Id.* at 335. On the specific issue of police officer witnesses, the Court observed:

> When a police officer appears as a witness, he may reasonably be viewed as acting like any other witness sworn to tell the truth-in which event he can make a strong claim to witness immunity; alternatively, he may be regarded as an official performing a critical role in the judicial process, in which event he may seek the benefit afforded to other governmental participants in the same proceeding. Nothing in the language of the statute suggests that such a witness belongs in a narrow, special category lacking protection against damages suits.

Id. at 335-36. Ultimately, the Supreme Court held in *Briscoe* that a state defendant cannot assert a Section 1983 action against a police officer for giving perjured testimony at the defendant's criminal trial. *Id.* at 326. The Court also declined to carve out an exception to the general rule of immunity in cases of alleged perjury by police officer witnesses. *Id.* The Court affirmed the Circuit's holding that all witnesses, police officers as well as lay witnesses, are absolutely immune from civil liability based on their testimony in judicial proceedings. *Id.* at 328. *See also Hunt v. Bennett*, 17 F.3d 1263 (1994), 1267-68 (10th Cir. 1994) (noting that all witnesses enjoy absolute immunity from civil liability under Section 1983 for their testimony in a prior trial and dismissing the claim against defendant for actions in his capacity as a witness at the preliminary hearing and trial). Therefore, defendants Malugani's and Johnson's trial statements are entitled to absolute immunity.

Although plaintiff tacitly accepts *Briscoe*'s application to the officers' trial testimony, plaintiff distinguishes Malugani's and Johnson's pretrial statements as that of complaining witnesses. Plaintiff cites *Malley v. Briggs*, 475 U.S. 335 (1986) and *Anthony v. Baker*, 955 F.2d 1395 (10th Cir. 1992) for the proposition that complaining witnesses should not receive absolute immunity. In *Malley*, the Supreme Court addressed the issue of what degree of immunity should be afforded a police officer alleged to have unconstitutionally arrested plaintiffs by presenting a complaint and affidavit that failed to establish probable cause. *Id.* at 337. Again, the Supreme Court examined the degree of immunity afforded at common law and determined that complaining witnesses were not entitled to absolute immunity. *Id.* at 340-41. Rather, the *Malley* court remanded the issue of whether the officer was entitled to qualified immunity. *Id.* at 344-46. The Court directed that the same standard of objective reasonableness applied in the context of suppression hearings defines the qualified immunity accorded an officer whose request for a warrant allegedly caused an unconstitutional arrest. *Id.* at 345. In the context of warrant applications, the Court noted that the shield of immunity will be lost only for an application so lacking an indicia of probable cause as to render official belief unreasonable.

Thus, the court must inquire whether the officers' pretrial statements are entitled to qualified immunity using the objective reasonableness standard. Evident from the findings of fact is that the officers' testimony at various stages of the proceedings is inconsistent with what they admit today. This is troubling to the court as it undercuts fundamental principles of the judicial system, where witnesses are

under oath and sworn to tell the truth. The officers now admit in several instances that they asked leading questions, even though they denied doing so in their report and at the suppression hearing. Such conduct is not objectively reasonable and condemnable behavior.

4. Fabrication of Evidence

Plaintiff provides an alternative framework for this case, defining it as Mr. Lowery's right not to be deprived of liberty on the basis of fabricated evidence. Plaintiff cites to several cases that have recognized this right. *Clanton v. Cooper*, 129 F.3d 1147, 1152 (10th Cir. 1997); *Castellano v. Fragozo*, 311 F.3d 689. 704-705 (5th Cir. 2002); *Devereaux v. Abbey*, 263 F.3d 1070, 1074-75 (9th Cir. 2001) (en banc); *Stemler v. City of Florence*, 126 F.3d 856, 872 (6th Cir. 1997). One example in this Circuit is *Pierce v. Gilchrist*, 359 F.3d 1279. 1298. In *Pierce*, the Tenth Circuit affirmed the district court's denial of qualified immunity to a forensic chemist alleged to have fabricated evidence that led to plaintiff's conviction and fifteen years in Oklahoma state prison. *Id.* at 1297-98. In recognizing a right to be free from fabricated evidence, the Circuit noted "'[O]fficials can still be on notice that their conduct violates established law even in novel factual circumstances . . . [T]he salient question . . . is whether the state of the law [at the time of the conduct] gave respondents fair warning that their alleged treatment of [plaintiff] was unconstitutional. *Pierce*, 359 F.3d at 1298 (citing *Hope v. Pelzer*, 536 U.S. 730, 741, 122 S.Ct. 2508, 153 L.Ed.2d 666 (2002)). "[A] defendant's due process rights are implicated when the state knowingly uses false testimony to obtain a conviction, *Pyle v. Kansas*, 317 U.S. 213, 216, 63 S.Ct: 177, 87 L.Ed. 214 (1942), or

withholds exculpatory evidence from the defense, *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963)." *Id.* at 1299. *See also Spurlock v. Satterfield*, 167 F.3d 995, 1005-06 (6th Cir. 1999) (rejecting qualified immunity where officers allegedly fabricated evidence and manufactured probable cause; holding that on the basis of *Brady* and *Pyle* "[the defendant] cannot seriously contend that a reasonable police officer would not know that such actions were inappropriate and performed in violation of an individual's constitutional and/or statutory rights."); *Newsome v. McCabe*, 256 F.3d 747, 752-53 (7th Cir. 2001) (finding *Brady* clearly established that officers could not withhold information that plaintiffs fingerprints did not match those found at the crime scene or that officers influenced witnesses to pick plaintiff out of police lineup).

Defendants cite *Taylor v. Meacham*, 82 F.3d 1556 (10th Cir. 1996) in response to plaintiff's argument. In *Taylor*, the plaintiff had been arrested and charged with murder and rape and jailed for seven weeks. DNA tests led authorities to drop charges, and plaintiff was released from custody. *Taylor* thereafter filed a Section 1983 claim against the sheriff alleging there was no probable cause to arrest. On appeal, the Tenth Circuit found there was no evidence which suggests the sheriff included false statements, or omitted any facts knowingly or with reckless disregard for the truth. *Id.* at 1563.

However, the Tenth Circuit in *Pierce* distinguished *Taylor* and recognized that a party may be able to proceed with a Section 1983 action despite the existence of probable cause. "In the case of a Fourth Amendment claim of falsified evidence, the existence of probable cause is determined by setting aside the

false information and reviewing the remaining contents of the affidavit." *Pierce v. Gilchrist*, 359 F.3d 1279, 1293 (10th Cir. 2004) (citations omitted).

Since defendants do not dispute that the right to be free from fabricated evidence was clearly established, the court proceeds directly to the factual issues. Based on the findings of fact, the court finds that plaintiff's claim survives summary judgment. The officers' statements the pretrial hearing bolstered the case for finding the confession to be voluntary. The combination of the officers asking leading questions and disclosing non-public facts to Mr. Lowery led to the creation of a credible confession. Had the court known of the inconsistencies in Mr. Lowery's testimony and the fact that he received non-public facts, the result of the suppression hearing would have been different. Defendants distorted their conversation with Mr. Lowery and misstated the context of some of his statements. Since knowledge of the specific facts in the crime led to Mr. Lowery's hearing, trial and conviction, the court permits Mr. Lowery's claim to proceed. Since there are material factual disputes, the court denies summary judgment on Mr. Lowery's fabrication of evidence claim.

5. Failure to Investigate Without a Reasonable Basis for Probable Cause Determination

Defendants seek qualified immunity on Officers Malugani, Johnson and Raynor's failure to adequately investigate the crime to seek out the true perpetrator. Count 1(C) of the complaint alleges the officers should have continued an investigation.

In support of a claim of qualified immunity, defendants cite *Romero v. Fay*, 45 F.3d at 1472. In *Romero*, the plaintiff was arrested for murder. *Id.* at

1474. When he was in custody, plaintiff informed the arresting officer he was innocent and had a complete alibi. *Id.* The defendant, Officer Fay, refused plaintiffs' offer of names of alibi witnesses and stated they wer of little significance because they would lie to protect plaintiff. *Id.* Defendant neither interviewed plaintiff's alibi witnesses, nor did he interview the individuals present in plaintiff apartment. Although plaintiff was imprisoned for at least three months, he was ultimately released from jail. Plaintiff then filed a Section 1983 action and alleged his constitutional rights had been violated. *Id.* On appeal, plaintiff argued that the officer did not have probable cause, even though he had two witness statements, because the officer did not investigate defendant's alleged alibi defense, which would have negated the probable cause. *Id.* at 1476-77. The Tenth Circuit rejected this argument and found the officer's actions were reasonable under the circumstances, and the officer was not under an obligation to investigate defendant's alleged alibi witnesses. *Id.* The court affirmed the grant of qualified immunity to Officer Fay. *Id.* at 1478. Defendants also cite *Baker v. McCollan*, 443 U.S. 137 (1979), in support of their argument that the failure to investigate is not a constitutional violation. However, the case is framed slightly differently from the way in which defendants attempt to employ it. In *Baker*, the Court found that since the respondent was arrested under a facially valid warrant, respondent could not bring a claim of deprivation of liberty. *Id.* at 145-46.

In response, plaintiffs argue that to establish a Fourteenth Amendment constitutional violation, a government official must injure an individual's life, liberty, or property interest with *deliberate or reckless intent* rather than simple negligent conduct.

Webber v. Medford, 43 F.3d 1340, 1343 (10th Cir. 1994) (emphasis added). Therefore, "only reckless or intentional failure to investigate other leads offends a defendant's due process rights." *Wilson v. Lawrence County*, 260 F.3d 946, 955 (8th Cir. 2001). *Id.* at 957 (noting that a failure to investigate other leads could easily be described as reckless or intentional). *See Sanders v. English*, 950 F.2d 1152, 1162 (5th Cir. 1992) (denying qualified immunity where evidence could support a finding that defendant had deliberately ignored exonerating information indicating he had arrested the wrong person); *Whitley v. Seipel*, 613 F.2d 682, 686 (7th Cir.1980) (noting that while negligent acts in an investigation do not violate due process, intentional acts do). Generally, the failure to investigate is not a constitutional violation is long as the officer in question reasonably established probable cause. *Hunter v. Bryant*, 502 U.S. 224,227 (1991) ("Even law enforcement officials who reasonably but mistakenly conclude that probable cause is present are entitled to immunity.") (citations omitted). *See also Whitley*, 613 F.2d at 686 (noting that "[i]f the officer undertakes to make decisions which are not his to make and then intentionally misleads those who do have the ultimate authority to authorize the arrest, that officer may be found to have deprived the arrestee of his liberty without due process of law.").

Again, since defendants do not contest that the right was clearly established, the court proceeds directly to the factual issues. The court agrees that defendants' authorities are not helpful in our present case as there is a fundamental question as to whether there was probable cause. Before the confession, defendants did not have probable cause to arrest Mr. Lowery. The only evidence of his presence at the scene was the fact that he was near the scene

at the time and had been seen at a local convenience store. After Mr. Lowery's confession, the officers argue that the voluntary confession provides a basis for probable cause. This argument is essentially bootstrapping. In essence, if the officers feed information and mislead others, they argue that they should be immune because they received the information that would establish probable cause. Based on the circumstances under which plaintiff's confession was procured, defendants had an obligation to investigate other suspects. In essence, defendants acted intentionally and recklessly.

6. Failure to Disclose Exculpatory and Impeachment Evidence to the Prosecution

Defendants also seek qualified immunity for the their alleged failure to disclose exculpatory and impeachment evidence to the prosecution. Count 1(B) of the complaint alleges that the officers are liable for failing "to document or disclose to the prosecutors material exculpatory and impeachment information." The "exculpatory and impeachment information" reference in the claim is Lowery's allegation that his confession was not voluntary and the product of coercion.

Defendants essentially raise two arguments in support of their claim. First, the Due Process Clause prohibits the state from withholding exculpatory evidence from the defense in a criminal prosecution. *See Brady v. Maryland*, 373 U.S. 83, 87 (1963). The duty imposed by the Due Process Clause under *Brady* is owed to the criminal defendant, not to the prosecution. *See Jean v. Collins*, 221 F.3d 656, 660-61 (4th Cir. 2000) (en banc). Next, Mr. Lowery was fully aware of the circumstances of his confession. Thus,

there was no information to withhold from the defense. Ms. Lowery responds that officers withheld exculpatory and/or impeachment evidence in violation of defendant's rights. Further, Mr. Lowery contends that the officers violated a right to a fair trial by withholding from prosecutors the fact they either fabricated evidence or coerced a confession.

"In a case involving the withholding of exculpatory evidence, the existence of probable cause is determined by examining the evidence as if the omitted information had been included and inquiring whether probable cause existed in light of all the evidence, including the omitted information." *Pierce v. Gilchrist*, 359 F.3d 1279, 1293 (10th Cir. 2004). For purposes of *Brady*, "evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence m the outcome." *United States v. Bagley*, 473 U.S. 667, 682 (1985). Information is exculpatory if it is "favorable to [the] accused," either because it would "tend to exculpate" him, or because it undermines the credibility of a material witness. *Brady*, 373 U.S. at 87, *Giglio*, 405 U.S. at 154-55. The disclosure duty under *Brady* applies to all members of the investigative or prosecutorial team.

The court proceeds to the factual issues, since defendant does not deny that this right was clearly established at the time of Ms. Lowery's arrest and prosecution. The findings of fact indicate that the officers withheld crucial information from the prosecutor as to the content and nature of the interrogation. This undermines the prosecutor's ability to determine whether a case should proceed. Without

the confession, defendants would have no basis for arresting Mr. Lowery. Thus, the court finds that the exculpatory evidence had more than a reasonable probability to undermine confidence in the outcome. Accordingly, the court finds that defendants are not entitled to qualified immunity.

7. Fourteen Amendment Substantive Due Process Claim

Plaintiff states that he will not be proceeding with his Fourteenth Amendment substantive due process claim. Plaintiff also states that he will not be pursuing a claim against Officer Raynor. Thus, these claims are dismissed from plaintiffs action.

8. Fourteenth Amendment Malicious Prosecution Claim

Defendants do not separately address the malicious prosecution claim under the Fourteenth Amendment. The only discussion of the malicious prosecution claim is in the summary judgment motion for state law claims. Mr. Lowery, however, did provide some discussion in support of the malicious prosecution claim.

In support of his argument, Mr. Lowery argues that in the § 1983 malicious prosecution context, that constitutional right is the Fourth Amendment's right to be free from unreasonable searches. *Taylor v. Meacham*, 82 F.3d 1556, 1561 (10th Cir. 1996); *Pierce v. Gilchrist*, 359 F.3d at 1289. In Kansas, "[t]o maintain successfully an action for malicious prosecution, the plaintiff must prove that the defendant initiated the . . . proceeding of which complaint is made, that the defendant in so doing acted without probable cause and with malice, and that the proceeding

terminated in favor of the plaintiff." *Vanover v. Cook*, 260 F.3d 1182, 1189 (10th Cir. 2001) (citations omitted). *Gilchrist* makes clear that initial probable cause is not a defense to subsequent police misconduct.

The court finds that the officers' actions in initiating proceedings forms the root of Mr. Lowery's present complaint. There is also allegation of deliberate misconduct that, if proven, would indeed amount to malice. Finally, that the proceeding terminated in favor of the plaintiff cannot be disputed in light of the aforementioned order vacating Mr. Lowery's conviction. *See Heck v. Humphrey*, 512 U.S. 477, 487 (1994) (holding that § 1983 malicious prosecution claimant can prove termination of prior criminal proceeding in his favor by showing that "the conviction or sentence has been . . . declared invalid by a state tribunal authorized to make such determination").

Accordingly, the court finds that plaintiff should be permitted to proceed with his constitutional malicious prosecution claim.

9. Conspiracy Claim and Supervisory Liability

Defendants argue that plaintiffs conspiracy and supervisory liability claims should fail because plaintiff cannot demonstrate a violation of a constitutional right. The court denied immunity to the officers immunity on several claims. Accordingly, plaintiff should be allowed to proceed with his claims.

10. Pendant Loss of Association

The court addressed the issue of pendant loss of association in its prior motion to dismiss and will not revisit the issue here.

B. State Law Claims

Defendants also move for summary judgment on Mr. Lowery's state law claims. Since the court has not granted immunity on all federal claims, the court will have to address defendants' motion on whether Mr. Lowery's state law claims survive summary judgment. In reaching a conclusion, the court relies heavily on the conclusions of law outlined in the discussion of qualified immunity.

At the outset, the court notes that the findings of fact for the state law claims are largely the same as those for qualified inununity. Defendants added only two additional uncontroverted facts in their motion for summary judgment on the state law claims. These two facts were that Mr. Lowery had served in the United States Army since April 1979 and that Mr. Lowery suffered no immediate physical injury following his confession. In his response, Mr. Lowery redacted some objections and offered fewer additional facts. Since the facts and objections are substantially the same, the court will apply the facts as set forth in Section III.

Defendants raise several arguments in support of their claim for summary judgment. Defendants first argue that Officers Malugani. Johnson and Raynor had probable cause to initiate a prosecution against Mr. Lowery because plaintiff's confession was voluntary. Defendants also note that any claim against Officer Raynor fails because the essential elements of a claim cannot be made against Officer Raynor. The court disagrees with defendants. Although the court has already found plaintiffs confession to be voluntary, plaintiffs state law claim of malicious prosecution may proceed against the officers because it is based on the fabrication of evidence and misrep-

resentations made by the officers. The parties already agreed to the dismissal of Officer Raynor, and thus no action can be maintained against him.

Defendants also argue that: 1) Officers Malugani, Johnson and Raynor are immune from liability for false arrest under Kan. Stat. Ann. § 75-6104(e): 2) Mr. Lowery fails to establish the elements of an abuse of process claim; 3) Mr. Lowery's claim of negligent infliction of emotional distress is barred because of the absence of immediate physical injury; 4) defendants cannot be liable for negligent training, supervision and adoption of policies because of the absence of an underlying tort. Plaintiffs counsel did not respond to these arguments because the parties already stipulated to dismissal of these counts in the "Stipulation for Partial Dismissal without Prejudice" entered in the court records on December 20, 2004. As a result, defendants' arguments are moot.

Accordingly, the court denies summary judgment to defendants on the state law claims.

The court discourages the parties from filing a motion to reconsider. If, however. the parties believe one is necessary, such motion should comply with the standards set forth by the Tenth Circuit and shall not exceed ten double-spaced pages. The response shall not exceed ten double-spaced pages. No reply shall be permitted.

IT IS ACCORDINGLY ORDERED this 15th day of September 2006, that the court grants in part and denies in part defendants' Motion for Qualified Immunity (Dkt. No. 56).

IT IS FURTHER ORDERED that the court denies defendants' Motion for Summary Judgment on State Law Claims (Dkt. No. 62), which defendant Riley County Law Enforcement Agency joined (Dkt. No. 77).

/s/ J. Thomas Marten
J. THOMAS MARTEN, JUDGE

APPENDIX B

PUBLISH

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

[Filed April 14, 2008]

No. 06-3369

EDDIE JAMES LOWERY; AMANDA MARIE LOWERY,
Plaintiffs - Appellees,

v.

THE COUNTY OF RILEY; RILEY COUNTY BOARD OF COMMISSIONERS; RILEY COUNTY LAW ENFORCEMENT DEPARTMENT, also known as Riley County Police Department; CITY OF MANHATTAN; MANHATTAN BOARD OF CITY COMMISSIONERS: CITY OF OGDEN; OGDEN BOARD OF CITY COMMISSIONERS; JOHN DOES 1-10, police officers and non-uniformed employees of the Riley County Police Department, in their individual capacities; RICHARD ROES 1-10, supervisory police officers of the Riley County Police Department, in their individual capacities; RILEY COUNTY LAW ENFORCEMENT AGENCY, The Law Board; WILLIAM WATSON,

Defendants,

and

HARRY L. MALUGANI; DOUGLASS JOHNSON, in their individual capacities; ALVAN JOHNSON; STEVE FRENCH; LARRY WOODYARD,
Defendants - Appellants.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS
(D. Ct. No. 04-CV-3101-JTM-DWB)

Jeffrey A. Bullins, Holbrook & Osborn, P.A., Overland Park, Kansas, appearing for Appellants.

Nick Brustin, Cochran Neufeld & Scheck, LLP, New York, New York (Barry A. Clark, Clark & Kellstrom, Chtd., Manhattan, Kansas; Barry Scheck and Monica R. Shah, Cochran Neufeld & Scheck, LLP, New York, New York; and Craig J. Altenhofen, Hornbaker, Altenhofen, McCulley & Alt, Chartered Lawyers,Junction City Kansas with him on the brief) appearing for Appellees.

Before O'CONNOR.* *Associate Justice* (Ret.). HENRY, *Chief Circuit Judge*, and TACHA, *Circuit Judge*.

TACHA, *Circuit Judge*.

In 1982, Eddie James Lowery was convicted after a jury trial in the District Court of Riley County, Kansas, of rape, aggravated battery, and aggravated burglary. His convictions were secured primarily on the basis of an unrecorded confession he made to Riley County Police Officers Harry Malugani and Douglass Johnson. He served ten years in prison and, upon release, spent another ten years as a registered sex offender. In 2003, however, DNA testing proved that Mr. Lowery did not commit the crimes. Thereafter, the same court vacated each conviction and sentence, declaring him actually innocent of the crimes. Mr. Lowery and his daughter Amanda then

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* The Honorable Sandra Day O'Connor, Associate Justice of the United States Supreme Court (Ret.), sitting by designation pursuant to 28 U.S.C. 294(a).

filed this action in federal district court under 42 U.S.C. § 1983 and Kansas state law against many of the individuals and municipal entities responsible for his arrest, conviction, and incarceration. The district court denied the defendants' motion for summary judgment based on qualified immunity, which the defendants now appeal.

I. BACKGROUND

The following facts are set forth in the light most favorable to Mr. Lowery as the nonmoving party. During the early morning hours of July 26, 1981, Mr. Lowery was involved in a car accident in the vicinity of Arta Kroeplin's house in Ogden, Kansas. At approximately the same time. Ms. Kroeplin reported that a burglar broke into her home and raped her. She knew that she was attacked by a single assailant, but she could not describe him because he covered her face with blankets during the attack. Indeed, she could not even identify the man's race and could only say he had a medium build. She reported that, during the attack, the rapist struck her three times in the head with a knife. An investigation revealed that the perpetrator entered through the back door of Ms. Kroeplin's home by cutting or tearing through the door screen.

The following day, Officer Malugani, who had learned of Mr. Lowery's accident, contacted Mr. Lowery and asked him to come down to the police station to talk. Mr. Lowery believed that Officer Malugani wanted to talk to him about the car accident. Because Mr. Lowery did not have transportation, Officer Malugani and Officer Johnson picked him up at his house at 4:00 p.m. and drove him to the Riley County Police Department.

When they arrived at the station, the officers took Mr. Lowery to an interview room and advised him of his *Miranda*[1] rights. Mr. Lowery was not told whether he was under arrest. He signed a written waiver of rights at approximately 4:30 p.m. The officers then questioned Mr. Lowery about the rape for forty-five minutes. Thereafter, the officers obtained written consent from Mr. Lowery to search his home. The record does not indicate whether the officers uncovered incriminating evidence. After completing the search, the officers asked if Mr. Lowery could return to the station the following day to take a polygraph examination. Mr. Lowery said that he could, although he might need to be picked up again.

Officer Malugani picked up Mr. Lowery at approximately 8:20 a.m. on July 28, 1981. Mr. Lowery had not slept much the night before and had not eaten breakfast that morning. When they arrived at the station, the officers again took Mr. Lowery to an interview room where he signed a waiver of his *Miranda* rights. The officers again questioned Mr. Lowery about the rape. Mr. Lowery asked for a lawyer. Officer Malugani told Mr. Lowery that because he was not under arrest, he did not need a lawyer at that time. Mr. Lowery was not provided with a lawyer.

From approximately 9:30 a.m. to 12:30 p.m., Mr. Lowery took a polygraph exam administered by Officer Allen Raynor. Mr. Lowery did not admit any involvement in the crime during the examination. The defendants claim the exam results, which have since disappeared, indicated deception on Mr. Lowery's part. Following the polygraph, Officers Malugani and Johnson further interrogated Mr.

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[1] *Miranda v. Arizona*, 384 U.S. 436 (1966).

Lowery. He again denied committing the crimes, but after Officer Malugani loudly and continually insisted that he had, Mr. Lowery became very confused and emotionally upset. He began crying and then responding affirmatively to the officers' suggestive questions in the hope that they would put him in jail and he would finally be able to speak with a lawyer.

For example, knowing that the perpetrator had broken the screen door, the officers asked Mr. Lowery: "How did you get into the house? Did you cut the screen door or bust it open and pull the screen back?" Mr. Lowery responded that he busted it open with his hands. Knowing that Ms. Kroeplin had been struck in the head, the officers asked Mr. Lowery if he hit her with a knife or with a vase. Mr. Lowery said he hit her with a knife. Knowing that Ms. Kroeplin's face had been covered during the attack, the officers asked Mr. Lowery whether he covered her face with a blanket or a pillow. Mr. Lowery said a blanket. According to Mr. Lowery, these are just some of the suggestive and leading questions the officers asked him. At the conclusion of the questioning, Mr. Lowery was arrested and charged with rape, aggravated battery, and aggravated burglary.

The officers then prepared their official report describing the confession. Although Mr. Lowery alleges that he largely adopted the officers' suggestions as to how he committed the crime, the officers represented in their contemporaneous report and in their communications with the prosecutor[2] that

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[2] The officers also testified at Mr. Lowery's trial that he volunteered nonpublic facts during his confession. The officers are, however, absolutely immune from any claim arising out of their testimony at trial, even if that testimony is perjurious. *Briscoe v. LaHue*, 460 U.S. 325, 328 (1983).

Mr. Lowery's confession was credible because he revealed, without prompting or suggestion, nonpublic facts that only the perpetrator of the rape could have known. In addition, the report contained other "admissions" that Mr. Lowery did not, in fact, make. For example, Mr. Lowery told the officers that he broke into the house through the front door. The perpetrator, however, gained entry through the back door, and the officers repeatedly maintained that Mr. Lowery told them he broke in through the back.

At trial, the prosecution relied heavily on the officers' report and their testimony describing Mr. Lowery's confession. The prosecution also presented evidence that Mr. Lowery, along with thirty-eight percent of the population, had the same blood type as the perpetrator. The jury could not reach a unanimous verdict. A second trial was held, and this time the jury convicted Mr. Lowery on all counts.

In 2003, the District Court of Riley County, Kansas vacated Mr. Lowery's convictions and declared him actually innocent of the crimes based on DNA evidence that excluded him as the rapist. Mr. Lowery then filed this action under § 1983 and Kansas state law. The claims relevant to this appeal include: (1) § 1983 claims against Officers Malugani and Johnson for violating his right to due process by coercing his confession and by failing to adequately investigate the crimes, and for violating his Fourth and Fourteenth Amendment rights by fabricating evidence and by maliciously prosecuting him; (2) § 1983 claims against Officers Malugani's and Johnson's supervisors for failing to train police officers and for conspiring to violate Mr. Lowery's constitutional rights; and (3) a § 1983 claim against all defendants for depriving Mr. Lowery and Amanda of

their right to familial association.[3] The defendants filed a motion for summary judgment on the basis of qualified immunity, which the district court denied with respect to all claims. The defendants now appeal. For the reasons that follow, we dismiss for lack of jurisdiction the defendants' appeal of the denial of qualified immunity as to the claims for coercion, failure to investigate, fabrication of evidence, and malicious prosecution. We reverse the district court's denial of qualified immunity on Mr. Lowery's and Amanda's claim for loss of familial association. Finally, we affirm in part and reverse in part the district court's denial of qualified immunity as to the supervisory liability claims.

II. DISCUSSION

Government officials performing discretionary functions are entitled to qualified immunity from liability for civil damages so long as "their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). In considering whether an official is entitled to qualified immunity, the first question a court must answer is "whether a constitutional right would have been violated on the facts alleged" by the plaintiff. *Saucier v. Katz*, 533 U.S. 194, 200 (2001). If so, the court must then determine whether the right asserted was clearly established at the time of the alleged violation. *See id.* In answering this latter question, the relevant inquiry is whether "the right

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[3] Several additional claims raised in the first amended petition have been dropped by the plaintiffs or are otherwise not before the Court in this interlocutory appeal. Those claims are not discussed herein.

was sufficiently clear that a reasonable officer would understand that what he is doing violates that right." *Gross v. Pirtle*, 245 F.3d 1151, 1156 (10th Cir. 2001) (alteration and quotations omitted).

Our jurisdiction to review an order denying summary judgment on the basis of qualified immunity stems from 28 U.S.C. § 1291, which permits us to consider appeals from "final decisions" of the district court. Although the denial of summary judgment is an interlocutory order not ordinarily subject to immediate appellate review under § 1291, the Supreme Court has held that the denial of summary judgment based on qualified immunity falls within the collateral-order exception to that statute. *See Mitchell v. Forsyth*, 472 U.S. 511, 526-27 (1985). Our jurisdiction over such orders, however, is not without limit: we may consider a qualified-immunity appeal only to the extent it turns on a matter of law. *See Johnson v. Jones*, 515 U.S. 304, 313 (1995). Reviewable issues of law include whether the right the defendant allegedly violated was "clearly established" at the time of the violation, *see Behrens v. Pelletier*, 516 U.S. 299, 313 (1996), as well as whether the plaintiffs' version of the facts amounts to a constitutional violation, *see Garrett v. Stratman*, 254 F.3d 946, 952 (10th Cir. 2001) ("[W]hen the plaintiffs' allegations are taken as true, denial of summary judgment on qualified immunity resolves an abstract issue of law and is immediately appealable."); *Gross*, 245 F.3d at 1156-57. We do not have jurisdiction to resolve disputed issues of fact and have therefore observed that a defendant may not appeal the sufficiency—as opposed to the legal significance—of the plaintiff's evidence. *See Garrett*, 254 F.3d at 953 ("If we determine the district court's conclusion rests on findings of evidence sufficiency, we must dismiss for

lack of jurisdiction." (quotations omitted)); *Gross*, 245 F.3d at 1156 ("Courts of appeals clearly lack jurisdiction to review summary judgment orders deciding qualified immunity questions solely on the basis of evidence sufficiency—which facts a party may, or may not, be able to prove at trial." (quotations omitted)).

A. *Nonreviewable Questions of Fact: Claims for Coercion, Failure to Investigate, Fabrication of Evidence, and Malicious Prosecution*

The defendants dispute the factual allegations that support Mr. Lowery's claims for coercion, failure to investigate, fabrication of evidence, and malicious prosecution. Although the defendants claim that they accept Mr. Lowery's allegations as true, the defendants in fact only cite to select portions of the record evidence and ignore the allegations as pleaded in Mr. Lowery's complaint and supported by other record evidence. Specifically, the defendants contest the nature of and circumstances surrounding the questioning that led to Mr. Lowery's confession, as well as the extent—if any—to which Mr. Lowery was in custody during the questioning. This amounts to a challenge to the sufficiency of the evidence, which presents a question of fact that we do not have jurisdiction to consider. *See Garrett*, 254 F.3d at 953; *Gross*, 245 F.3d at 1156. We therefore dismiss the defendants' appeal of the district court's denial of qualified immunity as to those claims.

B. *Reviewable Questions of Law: Claims for Loss of Familial Association and Supervisory Liability*

1. *Loss of Familial Association*

A child has a constitutionally protected liberty interest in a relationship with her parent. *See*

Roberts v. U.S. Jaycees, 468 U.S. 609,617-18 (1984) ("[C]hoices to enter into and maintain certain familial human relationships must be secured against undue intrusion by the State because of the role of such relationships in safeguarding the individual freedom that is central to our constitutional scheme. In this respect, freedom of association receives protection as a fundamental element of personal liberty."); *Trujillo v. Bd. of County Comm'rs*, 768 F.2d 1186, 1189 (10th Cir. 1985) (holding that a parental relationship is a constitutionally protected liberty interest). This right to familial association is grounded in the Fourteenth Amendment's Due Process Clause. *J.B. v. Wash. County*, 127 F.3d 919, 927 (10th Cir. 1997). To determine whether a substantive right protected by the Due Process Clause has been violated, we balance "the individual's interest in liberty against the State's asserted reasons for restraining individual liberty." *Youngberg v. Romeo*, 457 U.S. 307, 320 (1982). In addition, in *Trujillo*, we held that "an allegation of *intent* to interfere with a particular relationship protected by the freedom of familial association is required to state a claim under section 1983." 768 F.2d at 1190 (emphasis added). As a result, "'[n]ot every statement or act that results in an interference with the rights of familial association is actionable.' The conduct or statement must be directed 'at the familial relationship with knowledge that the statements or conduct will adversely affect that relationship.'" *J.B.*, 127 F.3d at 927 (internal citation omitted) (alteration in original) (quoting *Griffin*, 983 F.2d at 1548).

Here, Mr. Lowery and Amanda conceded during oral argument that, because there is no evidence that any of the defendants directed their conduct at the familial relationship, *Trujillo* forecloses relief. They

seek merely to preserve this issue for en banc review, which they claim is justified in light of more recent cases questioning *Trujillo's* holding. *See, e.g., Smith v. City of Fontana*, 818 F.2d 1411, 1420 & n.12 (9th Cir. 1987) (expressly declining to follow *Trujillo* and holding that the facts giving rise to a plaintiff's claim for excessive use of force by the police also "give[] the [plaintiff's] children a substantive due process claim based on their loss of his companionship"), *overruled on other grounds by Hodgers-Durgins v. de la Vina*, 199 F.3d 1037 (9th Cir. 1999) (en banc). Because *Trujillo* remains the law of this Circuit. however, the defendants are entitled to qualified immunity on Mr. Lowery's and Amanda's claim for loss of familial association.

2. *Supervisory Liability*

A supervisor may be held liable under § 1983 for the acts of his subordinate only if the plaintiff shows that the subordinate violated the Constitution and that there is an affirmative link between the supervisor and the violation—"namely the active participation or acquiescence of the supervisor in the constitutional violation by the subordinate[]." *Serna v. Colo. Dep't of Corr.*, 455 F.3d 1146, 1151 (10th Cir. 2006). The defendants argue that Officers Steven French, Larry Woodyard, and Alvan Johnson are not liable as supervisors or coconspirators under § 1983 because Mr. Lowery has failed to allege sufficient facts to establish that their subordinates, Officers Harry Malugani and Douglass Johnson, violated his constitutional rights. But the district court concluded that Mr. Lowery stated claims against Officers Malugani and Johnson for coercion, failure to investigate, fabrication of evidence, and malicious prosecution. Because we have not disturbed these rulings

on appeal, Mr. Lowery's supervisory and conspiracy claims must also survive summary judgment. To the extent the supervisory and conspiracy claims are premised on Mr. Lowery's and Amanda's loss of association claim, however, Mr. Lowery has failed to allege the violation of a constitutional right. Qualified immunity therefore shields the supervisors from liability on the basis of that claim.

III. CONCLUSION

We DISMISS for lack of jurisdiction the defendants' appeal of the denial of qualified immunity as to the claims for coercion, failure to investigate, fabrication of evidence, and malicious prosecution. We REVERSE the district court's denial of qualified immunity as to Mr. Lowery's and Amanda's claim for loss of familial association. We AFFIRM in part and REVERSE in part the district court's denial of qualified immunity as to the supervisory liability claims. Finally, we GRANT the defendants' motion to supplement the record on appeal.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

[Filed May 6, 2008]

No. 06-3369

EDDIE JAMES LOWERY; AMANDA MARIE LOWERY,
Plaintiffs - Appellees,

v.

THE COUNTY OF RILEY, *et al.*,
Defendants,

and

HARRY L. MALUGANI; DOUGLASS JOHNSON, in their individual capacities. ALVAN JOHNSON; STEVE FRENCH; LARRY WOODYARD,
Defendants - Appellants.

ORDER

Before O'CONNOR,* *Associate Justice* (Ret.), HENRY, *Chief Circuit Judge*, and TACHA, *Circuit Judge*.

This matter is before the court on appellants' Petition for Rehearing En Banc. The Court previously issued an order calling for a response to the rehearing petition that was subsequently stricken due to clerical error. We now issue the order calling for a response again with a revised due date for the response.

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* The Honorable Sandra Day O'Connor, Associate Justice of the United States Supreme Court (Ret.), sitting by designation pursuant to 28 U.S.C. § 294(a).

Appellees shall file a response to the Petition for Rehearing En Banc on or before May 19, 2008. In addition to addressing appellants' arguments the response should specifically discuss the impact of *Scott v Harris*, 127 S. Ct. 1769 (2007) on the issue of this court's jurisdiction to review the denial of summary judgment.

Entered for the Court

/s/ Elisabeth A. Shumaker
ELISABETH A. SHUMAKER, Clerk

APPENDIX D

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

[Filed: June 17, 2008]

No. 06-3369

EDDIE JAMES LOWERY, *et al.*,
Plaintiffs - Appellees,

v.

THE COUNTY OF RILEY, *et al.*,
Defendants,

and

HARRY L. MALUGANI, *et al.*,
Defendants - Appellants.

ORDER

Before O'CONNOR,* *Associate Justice (Ret.)*, HENRY, *Chief Circuit Judge*, TACHA, KELLY, BRISCOE, LUCERO, MURPHY, HARTZ, O'BRIEN, McCONNELL, TYMKOVICH, GORSUCH, and HOLMES, *Circuit Judges*.

Defendants-Appellants' petition for rehearing is denied by the panel.

The petition for rehearing en banc was transmitted to all of the judges of the court who are in regular

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active service. A poll was requested, and Judge O'Brien voted to grant rehearing.

The petition is therefore denied.

Entered for the Court

/s/ Elisabeth A. Shumaker
ELISABETH A. SHUMAKER, Clerk

APPENDIX E

* * * *

[73] room that you spoke of about, that he was in on the 27th, is that right? The same interview room?

A. They're one of the two that are located next door to one another in the administration building.

Q. And at the time that this interview was conducted on the 28th in the afternoon was that interview root locked?

A. No, it was not.

Q. Was the building locked in any way?

A. No, it was not.

Q. Did the defendant at any time request to terminate this interview prior to the time he made his admissions to you?

A. No, sir.

Q. If he had prior to the time he made the admissions to you—what if he had requested to terminate the interview? What would you have done?

A. Taken him home.

MR. CAFFEY: No other questions.

MR. VOGEL: No questions.

THE COURT: Very well. Step down.

MR. CAFFEY: I have no other questions, Your Honor.

THE COURT: Very well. Are you ready to proceed, Mr. Vogel?

EDDIE LOWERY,

called as a witness in behalf of himself, being of legal age and having been first duly sworn, testified as [74] follows:

DIRECT EXAMINATION

BY MR. VOGEL:

Q. Would you state your name please?
A. Eddie James Lowery.
Q. And your occupation?
A. I work at Fort Riley in the U. S. Army.
Q. What is your rank out there?
A. E4.
Q. How old are you?
A. 22.
Q. And your education?
A. High school graduate.
Q. Do you recall what, if anything, happened on May the—excuse me, Monday, July 27th, 1981?
A. Yes, I had gone to work Monday morning and when I came home that afternoon Shelly Payne (sp) was there and she told me to call Investigator Malugani.
Q. Who is Shelly Payne?
A. She was a girl that was at my trailer at the time.
Q. And did you then, in fact, call Officer Malugani?
A. Yes, she give me the message and I called him and they came down and picked me up.
Q. Do you recall about what time—they meaning who now?
A. Well, it was Investigator Malugani and Johnson.
[75] Q. Do you recall about what time they came down on the 27th of July and picked you up?
A. About 4:00 o'clock.
Q. Do you recall when they picked you up if they indicated the reason why they wanted to talk with you?

A. I got the understanding it was because of the accident that I was involved the previous night.

Q. Were you arrested at that time?

A. No, they asked me to come down to the police station with them and talk to them and the whole time I thought it was because of the accident I was in the previous night.

Q. Do you recall about what time then that you arrived at the police station?

A. Must have been around, I guess 4:30.

Q. What happened after you arrived at the police station?

A. I was placed into an interview room and Investigator Malugani and Johnson came to the room and started asking me questions.

Q. Now previously there was testimony that prior to those questions being asked that afternoon that you signed a waiver of rights. Do you recall that?

A. Yes, I signed a waiver Miranda warning.

Q. I hand you what's been marked State's exhibit 1, do you recognize that?

A. Yes.

Q. And is that your signature on there?

[76] A. Yes.

Q. And what time does it indicate in date that that was signed?

A. 07, July 27th, '81 at 1630 hours.

Q. And do you recall, in fact, signing that?

A. Yes.

Q. After you signed the waiver of rights what occurred?

A. Well, Detective Malugani started asking me questions about these crimes that were committed and I asked him about, I go, "Well, I thought you guys brought me down here for the automobile

accident that I was in" and he goes, "No, that ain't our jurisdiction, we're here for—

Q. You're talking too fast and it's hard to understand, Eddie, and I need to kind of specifically ask you questions as we go along.

A. Okay,

Q. So, you're stating then that Officer Malugani started asking you questions about some crimes that were committted?

A. Right.

Q. Okay, what type of questions did he ask you?

A. He asked me if I knew anything about a crime that was committed in the early hours of Sunday and he had told me that somebody had been raped and their house had been burglarized.

Q. And how did you respond to that?

A. I told him that I didn't know nothing about that.

[77] Q. How long were you questioned that day, do you remember about how long it was?

A. I think it was about 45 minutes to an hour.

Q. And who was present during that questioning?

A. Investigator Malugani and Johnson.

Q. Can you explain or describe their conduct or the way the asked you the questions?

A. Well, Investigator Johnson, he really didn't say too much. Investigator Malugani, he was the one kind of getting rough with me in a way. He had been telling me, you know, that, "Lowery," he goes, "we think you're the one that did this" and then I kept on telling him that didn't do that and at one point he had told me he had 10 more years left on the force and if it took him the 10 years he was going to prove that I caused these crimes.

Q. And that was the first day that that sort of conversation transpired.

A. Yes, sir.

Q. What was his tone of voice when he was saying that?

A. Well, at first when he talked to me it was kind of normal and he started raising it. He didn't really shout but he got kind of loud with me, you know.

Q. So you're stating that at the first interview Malugani was indicating that he felt that you committed those crimes?

A. Right, yes, sir.

[78] Q. And you denied those?

A. Yes, sir.

Q. Any time during the interview that occurred on July 27th did you ever request an attorney?

A. No, sir, I don't think I did.

Q. Do you recall if any of the police officers indicated that you were not under arrest? This is, again, we're just talking about July the 27th?

A. The only time he said anything about arrest was when he read off the Miranda warning when they put me in the interview room.

Q. And what did they say then?

A. They just read off the Miranda warning. They didn't tell me if I could leave or they were putting me under arrest or anything.

Q. During the questioning on the 27th, what was your feeling whether you could leave or not?

A. If I got up and left they would probable put me in jail or something.

Q. Why did you feel that way?

A. I really didn't—I didn't know. I thought they were actually accusing me of the crime right then and I felt that I couldn't leave then. I didn't know I could get up and leave and walk out at any time.

Q. Did you ever ask to leave on the 27th?

[79] A. I don't know. I didn't know if I could or not.

Q. Do you recall about what time the questioning ended on the 27th of July?

A. I don't really recall that but I guess somewhere around 5:30 or so.

Q. After the questioning was over what happened?

A. After they questioned me they asked me if I would sign a search warrant to search my car and my trailer and I told them I would.

Q. Why did you volunteer to do that?

A. Because I had nothing to hide.

Q. After you signed that search warrant what happened?

A. After I signed the search warrant they took me out and put me in a car and took me back to my trailer.

Q. And what happened when you arrived back at the trailer?

A. They searched my car and my trailer.

Q. Okay, after they were through searching what happened?

A. Well, they were inside my trailer and everything and the had me go through Shelly Payne's purse for some reason and they asked me whose purse it was and I told them it was Shelly Payne's and I told them it was not my property and I didn't want to go through it.

Q. After that though, what happened?

A. They asked me if I could come back the next day.

Q. Did you agree to it?

[80] A. I said yes I would.

Q. Why did you agree to it?

A. I didn't have nothing to hide from them.

Q. What was the arrangement that was made about you talking to the police the next day as far as getting to the police station?

A. They told me, I told them, they asked me to come in at 8:00 o'clock. I told them I could and the next morning I couldn't find a car so I called up Investigator Malugani and he came and picked me up.

Q. Do you recall about what time Officer Malugani picked you up that morning, July 28th?

A. It was 8:30.

Q. At the time he picked you up were you ever advised you were under arrest?

A. No.

Q. What conversation, if any, took place between you and Officer Malugani on the trip from Ogden back to the police department?

A. Well, he asked me if I had a good night's sleep and I told him I didn't sleep too much and then he asked me, let me see, I think that was about all that went on, you know. We didn't really talk about the crime at any time.

Q. Do you recall if you had anything to eat that morning before Officer Malugani picked you up?

[81] A. No, I didn't eat at all.

Q. What happened then after you were transported back to the Riley County Police Department?

A. I was put inside the interview room again and that's when they—I signed the Miranda warning.

Q. And did you sign one?

A. Yes, sir.

Q. I hand you what's been marked State's exhibit #2. Is this an accurate copy of the one that you signed?

A. Yes.

Q. And that's your signature on that?

A. Yes, sir.

Q. What's the date and time on there that you signed that?

A. July 28th, 1981 and 0851 hours.

Q. 0851?

A. Yes.

Q. After you signed that waiver of rights form, what happend?

A. Malugani came in the—well, Malugani asked me if I was going to still take the lie detector test and I told him that I didn't think it would work and that I really didn't want to take it now and finally he said that, he goes, "Well, it's going to prove if you're innocent or guilty or not" and then they started telling me that they would explain how it worked to me.

Q. Without getting into details of the polygraph, what other [82] conversation took place between you, Officer Malugani, and Officer Johnson at that time, if any?

A. Investigator Malugani, he asked me a few more questions about the crime when I was sitting in there before the polygraph test.

Q. Like what, can you remember any of them?

A. He asked me if I remembered anything more about the crime that was committed and if I—and he goes, "Are you the one that knows anything about this crime that was committed?" And I kept on telling him that I didn't know anything about it the whole time.

Q. Do you recall during that time frame there if you ever requested to see an attorney?

A. Malugani was inside there with me and after he got done asking me a few questions I asked him if I could get a lawyer and Malugani goes, he goes, "I don't think there's, you need one right now because

all we want to do is find out some information from you." And I go, "Okay."

Q. But you did?

A. I did ask Malugani if I could see a lawyer and he told me that there's no probable cause for one right now because I wasn't under arrest or anything.

Q. After, did any questioning then continue after Officer Malugani stated that there was no reason to have a lawyer?

A. He just started going into the polygraph test. He finally [83] talked me into taking it because I told him I didn't want to take it.

Q. Was there any, can you explain the demeanor or conduct of Officer Malugani or Johnson during this time frame we're talking about now as far as how they acted when they asked you questions?

A. That morning?

Q. Yes. If there's anything distinguishable. If not, fine.

A. I don't think so.

Q. Then after, what happened after Officer Malugani talked with you?

A. They had left me in the room by myself for about an hour or so.

Q. Then what-happened?

A. And then they came back in and they got me and took me over to see the one who was working the lie detector test.

Q. Officer Raynor?

A. Yeah, Officer Raynor and took me over to him.

Q. And how long were you with Officer Raynor?

A. About three hours.

Q. After you were through talking with officer Raynor, what happened?

A. Investigator Malugani and Johnson came back down and got me and took me back over to the interview room.

Q. Now from the time you were originally picked up that [84] morning and brought to the police station up to the time that Officer Raynor was through talking with you had you eaten anything?

A. No.

Q. Why not?

A. I didn't know if I could eat there or what so I didn't even ask or anything.

Q. Did they offer to feed you?

A. Not to my recollection they didn't offer me anything. They offered me coffee. That was about it.

Q. How about food?

A. They didn't offer me any food that I can remember.

Q. So then after the questioning by Officer Raynor then your testimony is you were taken back over to the main building and to one of the interview rooms over there again?

A. Yes, sir.

Q. Do you recall after talking with Officer Raynor if you ever requested an attorney?

A. After talking to him?

Q. Yes, after or during, whatever you can remember.

A. Well, I guess it was after his statement that I made.

Q. What now? Oh, after the admissions, you mean?

A. Right.

Q. So you're saying you don't recall then any—well, you tell me what you're saying.

[85] A. Okay. I'm saying that after I made the oral confession and everything, that's when I made the request for an attorney.

Q. Who was present in the interview room besides yourself after Officer Raynor was through questioning you next door?

A. Malugani and Johnson.

Q. Can you describe a little bit about how that questioning went?

A. Well, I sit in the interviewing room and Malugani kept on, you know, telling me, kind of telling me to admit to this crime that they'd get me help if I needed to and I kept on telling them that I didn't do this and I told them that I shouldn't have took the polygraph test anyway because I was a very nervous person and Malugani kept on saying, "Lowery, if you'll admit this we'll get you the proper help that you need." I kept telling him I didn't need no help that I didn't do this crime.

Q. Can you describe his demeanor or tone of voice at that time?

A. Detective Johnson didn't really raise his voice much but Malugani raised his voice at me a lot telling me to admit this crime and if I admitted he would get me help.

Q. And how were you, how were you doing at that time?

A. I was really confused. Really emotionally upset about all this. I really didn't know how to take it and every [86] thing.

Q. Anything else that Officer Malugani brought up during that questioning that you remember?

A. They brung up my past history about my brother that was killed and they brung up my sister that was raped.

Q. Anything else that you remember? Well, after that questioning or that conversation took place what happened?

A. After he brung up my past history?

Q. Yes.

A. Oh, I was sitting there and they talked about me having my head hung down low. Well, that's natural for me because I always do that. I always have my head hanged down low when I'm talking to somebody but, okay, after that they asked me to admit to this crime. They asked me how I did it and everything and I just kept on telling them that I didn't do this crime.

Q. Okay. Well, how did you finally explain to them how you did it?

A. Well, at that point I was really upset and everything and I was crying at the time and everything and really emotionally upset and Malugani—okay, I told him that I parked the car out in the front yard.

Q. Why did you say that?

A. He was on my back a lot and everything. I just wanted to get the whole thing over with. I was all confused about [87] everything. I didn't know what to do and I just wanted to get away from it all.

Q. What else then happened?

A. Malugani asked me what I did after I parked the car. I told him that I went up to the door and he goes, "Well," he goes, "how did you get in?" And I didn't say anything I paused for a while. He goes, "Did you cut the screen door down or did you bust it open?"

Q. He asked you that way?

A. He asked me if I sliced the screen door or pulled it and I just told him that I busted it open with my hand.

Q. And why did you say that?

A. I don't know. It just sounded like the natural thing to say at the time because he told me at the time that he didn't think I busted it down with my hand. He said I used a knife to do it with.

Q. Are you saying that he was the first one to suggest about a screen being busted down?

A. Yes.

Q. You didn't bring that up first?

A. No, I just said I went up to the door and he goes, "How did you get in?" I didn't say anything and then he said he goes, "Did you cut the screen door down or open—or did you bust it open with your hand?" I said I busted it open with my hand.

[88] Q. Then what happened?

A. I busted it open the door with my hand and busted open the door and they asked me if I was in the front or back and I said I was in the front, you know.

Q. Do you know, do you have any knowledge at this time whether there was a front door or back door entered into?

A. No, I don't even know what the place looks like.

Q. Go ahead.

A. I told him that I was inside the house, that I was running around inside the living room and kitchen and everything and then I told him and Malugani goes, he goes, "What caught your attention to the—down the hall?"

Q. What caught your attention down the hall?

A. He asked me what caught my attention and I told him I heard somebody down the hall inside the room and he goes "Did you go down there?"

Q. Who mentioned the hall first?

A. Malugani, he was doing most of the questioning to me.

Q. What happened?

A. He asked me if I went down the hall and I said yes and he said, "Did you go into a room?" I said I went into a bedroom and he said, "What did you do then?" I didn't say anything because I didn't know what to say and he goes, "c'mon, Lowery, tell me what you said, you're almost there. Just tell us what you did and it will be over with for you." [89] I kept on crying and everything and I was holding my head down, you know, and I finally said, he goes, "Did you have a knife in your hand?" I go, "Yeah." And he goes, I go—

Q. Excuse me for interrupting. He asked you, did you have a knife in your hand?

A. Yes.

Q. Had the word knife been brought up in any other of the other interrogations before that?

A. He said that the screen door was cut down with a knife.

Q. All right.

A. And I told him I was in the room and everything. He goes, "What did you do?" I said I jumped on her, jumped on the bed. He goes, "Did you hit her or anything?" I go, "No, I didn't hit her." He goes, "C'mon, Lowery, tell us the whole truth. Did you hit her with a vase or with a knife—butt of the knife?"

Q. He asked those specific questions?

A. He asked me if I hit her with a vase or the butt of the knife.

Q. Then what was asked?

A. And then he asked me, he goes, "Well, what was she wearing" and everything and he said, I said

a nightgown, I guess, you know. I just told him a nightgown.

Q. Then what happened?

[90] A. And then after that I was pausing for a while and everything just really upset, you know. I didn't know what to do at the time.

Q. Was there anything else happen, any other admissions during that time, any other questions he asked that you remember?

A. I recall him asking me about what she was wearing. He asked me if she was wearing pajamas or a gown, a nightgown and I just told him a nightgown and he asked me if she was wearing underwear or not and I told him yes, she was wearing underwear.

Q. Now, you heard Officer Malugani and Officer Johnson testify earlier that the way those questions were asked to you is that they would say what happened, now what happened, what did you do next, that sort of questioning Are you saying that this, in fact, is not the way it occurred?

A. I'm saying that isn't how it occurred. They were really pressuring me a lot at the time. From the starting of all this I had nothing to do with this and I was cooperating with them and everything.

Q. You were what? Cooperating?

A. Yes and I kept on telling them I didn't have nothing to do with this and they were jumping all over me telling me to admit this and they would seek proper help for me.

[91] Q. Do you recall at all during the day, the 28th of July, if you ever requested an attorney?

A. Yes.

Q. Which times do you remember if any?

A. The most distinct time I remember was before the polygraph test and that's when Malugani told me that, he goes, "There's no need for one right now" you

know, "all we want to do is find out a few answers from you." I said, "Okay."

Q. After you made these admissions what happened?

A. I asked for a break and they gave me a break.

Q. Who was with you during your break?

A. Nobody, just me.

Q. In that interview room?

A. Right.

Q. After the break was over what happened?

A. They came back in and I think they had me sign another Miranda warning, I'm not sure or they read my rights off to me and told me I was under arrest for rape and burglary and assault.

Q. Had you ever, before that time, been advised that you were under arrest?

A. No.

Q. Do you recall any time on the 27th of July or 28th of July if you were specifically advised that you were not [92] under arrest?

A. The only time that I remember them telling me that I was not under arrest was on the 27th.

Q. But you don't recall them mentioning that at all on the 28th?

A. No, they didn't tell me if I was under arrest or if I was being arrested or if I could leave or anything.

Q. Can you explain to the Court your interpretation or your feeling of whether you were under arrest or not on the 28th of July?

A. I felt that I was under arrest and that I couldn't leave. If I left they'd just throw me in jail right there.

Q. Why did you feel that?

A. Because of the way they were asking me questions and getting on me. The way that they were talking to me like Malugani he told me to admit to

these crimes and stuff and I figured they were going to arrest me no matter what I did.

Q. Do you recall then about what time you finally were arrested?

A. Must have been around 4:30 or so.

Q. On July 28th?

A. Right.

Q. And your testimony is that that was after you made those oral admissions that that was when you finally—you were finally advised you were under arrest?

A. Right.

[93] MR. VOGEL: No other questions, Your Honor.

CROSS EXAMINATION

BY MR. CAFFEY:

Q. Mr. Lowery, how long have you been in the Army?

A. I was in the Army since April 16th, 1979.

Q. And you were what, an E4, did you say?

A. I'm presently an E4.

Q. To reach the—Sp.-4?

A. Sp.-4, yes.

Q. To reach the rank of Sp.-4 I assume that it would be difficult for someone who was not reasonably intelligent to reach the rank of Sp.-4, would it not?

A. What do you mean?

Q. It would be difficult if someone were of subnormal intelligence to reach the rank of Sp.-4, would it not?

A. If he knew his job and did his job he made his rank.

Q. Do you consider yourself reasonably, of normal intelligence?

A. I'm a normal person, yes.

Q. And when you were read the Miranda rights you understood those, did you not?

A. Yes.

Q. You didn't have any questions about it?

A. No, not at that time I didn't.

Q. You were read those rights several times, weren't you?

A. Three times, three Miranda warnings that I signed.

[94] Q. Well, you signed three but you said you had an additional time at least one other time that you were informed of the rights verbally, is that correct?

A. Malugani said that to me.

Q. So that would be four times that you were informed of your rights?

A. Malugani told me the first day verbally and then he had me sign the Miranda warning.

Q. And then the second day you were also informed verbally?

A. No, the second day he told me that this is the same thing I had received Monday, it was a Miranda warning and he had me read—he had me read the Miranda warning and sign my initials on it.

Q. And when you talked with Sergeant Raynor didn't he read it to you and you sign that also?

A. I might have, I don't know. I don't remember if he had one or not because he had quite a few pieces of paper.

Q. I believe just a few minutes ago you testified that you think there was another time that they read you your rights but you didn't sign anything.

A. That was the first day.

Q. Well, after you made your statement and before you were arrested, didn't they again inform you of your rights? A. Before I was arrested?

Q. Before you were arrested, didn't you say that they [95] informed you of your rights once more?

A. Malugani said it verbally to me one time that I can remember. That was on Monday.

Q. Well, in any case, while you were there you knew what your rights were, didn't you?

A. Yes.

Q. Okay. And you said when you were there on the 27th that you felt that you couldn't leave. You felt that you were under arrest?

A. I felt that they were, you know, arresting me that day and everything for all of this.

Q. And you felt the same thing on the 28th?

A. Yes. I was surprised when he took me home.

Q. They took you home on the 27th?

A. 27th I asked them if I was going to be arrested and they said no and that's when I stopped worrying about it, that day.

Q. And you called the police department for them to come in and pick you up, right?

A. 28th.

Q. You actually called them the 27th too, you said, right?

A. Yeah, because they left a message.

Q. And they came out and picked you up on the 28th?

A. Right.

Q. And you still think you were under arrest on the 28th?

[96] A. No, the 27th I asked them if I was under arrest after they started questioning me and everything, what all this was about and they said no, they just wanted to ask me some questions so the 27th they asked me questions and everything and after they asked me questions they asked me if I would sign a search warrant.

Q. Consent to search?

A. Yeah, whatever it is. And at my trailer, see, they searched my trailer and my car and asked me if I could come back Tuesday and I said yes.

Q. But you knew by that time that you weren't under arrest?

A. Yes.

Q. You probably figured that out because they took you home and left you there?

A. They told me I wasn't under arrest Monday.

Q. And yet you thought when you called them and asked them to come and pick you up from the police department to your home and take you to the police department, you thought that meant that they were arresting you?

A. Well, not right then I didn't but after I got down there and they started asking me questions and everything.

Q. And did the police department at any time on the morning of the 28th prevent you from eating breakfast?

A. Prevent me from eating?

Q. Yes.

[97] A. No.

Q. You were home, weren't you?

A. Yes.

Q. You could have eaten breakfast if you wanted it?

A. I could have.

Q. Did they tell you no, we won't feed you lunch?

A. No, as far as I know there was no mention of food at all

Q. You didn't ever ask them?

A. No.

Q. So you weren't complaining, saying I'm hungry, you're starving me to death or anything like that?

A. No, I wasn't thinking about it at the time.

Q. Now, didn't you say that the reason that you went back dawn there was you said you had nothing to hide from them?

A. Right.

Q. And not because they forced you to come down to the police department?

A. They asked me to cooperate with them and everything would go a lot easier and I said okay.

Q. Okay. Now, you said that during the interview at some point in that sometime they mentioned something about a brother who was killed and a sister who was raped?

A. They brung it up, yeah, they went back through my past history.

Q. But that's something you told them, I take it?

[98] A. Right.

Q. Then you admitted that you told them that you drove this car, your car to the victim's house and parked it near her house, you admitted that you told them that?

A. Right.

Q. And you admit that you told them you went up to the door and you told them that as you put it, I believe, busted the screen door with your hands?

A. Yeah, I told them that.

Q. You told them that?

A. Right.

Q. And you busted open the door?

A. Right, I told them I busted open the door.

Q. You told them you went inside the house?

A. Right.

Q. You told them you heard someone inside a room or—and that you went into this bedroom?

A. Right.

MR. VOGEL: Again, Your Honor, I might interject one thing. He's stating that he might not have actually verbalized those but he's answering yes.

THE COURT: If he didn't tell them that he can so indicate that.

MR. VOGEL: Well, on direct examination he didn't say that.

[99] THE COURT: I understand that. I understand what the officers say as well. If he wants to clarify his answer: he can do so without counsel's help.

Q. (By Mr. Caffey) Now, you also admitted that you had a knife or that you picked up a knife?

A. I told them that I picked up a knife in the kitchen.

Q. And then you also told them that you hit this lady in the head with a butt of the knife, is that correct?

A. Malugani asked me if I hit her in the head with a vase or with the butt of a knife.

Q. Weren't you free to say no, I didn't hit her in the head with anything?

A. At the time I was really emotionally upset and I didn't know what to do at all. I had never been accused of any thing like this.

Q. They asked what she was wearing and you said a nightgown?

A. They asked me if she was wearing pajamas or a nightgown and I just told them nightgown.

Q. Again, you would have been free to say no, I don't know at she was wearing because I wasn't there. You could have said that, right?

A. I could have said that, yeah, but the way they talked—they talked like they were standing right there when all this went on.

Q. At the time you consented to take this polygraph test, [100] did you think you were under arrest?

A. I figured that they were going to arrest me.

Q. Well, seems to me that in your earlier—in your questioning you said that you had asked to have a lawyer just before this polygraph test was given?

A. I asked Malugani that.

Q. And Investigator Malugani said there was no reason for one because you were not under arrest?

A. Right.

Q. And yet you thought you were under arrest?

A. Yeah. I didn't know how they worked. I didn't know what they were doing.

Q. Do you suppose that maybe you might have confused—might be confused about that conversation?

A. No.

Q. You don't think you're confused at all?

A. Not that I can remember.

Q. At any rate, in the afternoon when you were being questioned there you didn't ask to terminate the questioning at any time, did you?

A. No, I didn't know if I could or not. I didn't know I could get up and just walk out or anything.

Can you look at State's exhibit #2 and can you read me the paragraph right there that I'm pointing to?

A. "If you decide to answer a question now without a lawyer [101] present you will still have the right to stop answering at any time. You also have the right to stop answering at any time Until you talk to a lawyer."

Q. You said that was read to you and you understood it?

A. I read it.

Q. I take it from what you testified to here today that you are now saying that what you told the police officers about where you parked the car and how you got into the house and all this is not true?

A. Right.

Q. So you're admitting that you lied to the police officers at that time, is that correct?

A. I told them that I tried to tell them that I didn't do this whole crime but they insinuated that I did do this and they were going to make me admit. He kept on saying I know you did this, just admit that you did this and everything will be all right.

Q. You admit that you told them an untruth at that time? You told them something that was not true?

A. Right.

CAFFEY: No other questions.

MR. VOGEL: No questions, Your Honor.

THE COURT: Thank you, you may step down. Do you have anything else?

MR. FOGEL: No, Your Honor.

APPENDIX F

[3] EDDIE JAMES LOWERY,

of lawful age, having been first duly sworn on his oath to state the truth, and nothing but the truth, testifies as follows:

DIRECT EXAMINATION

BY MR. VOGEL:

Q. Would you state your name, please?
A. Eddie James Lowery.
Q. And, Eddie, do you understand that you are not required to take the stand?
A. Yes, I do.
Q. And you would like to do so; is that correct?
A. Yes, sir.
Q. What is your age, please?
A. Twenty-two.
Q. Excuse me?
A. Twenty-two.
Q. And what's your educational level?
A. High school graduate.
Q. And where did you go to high school?
A. Charter Oak High School in Covina, California.
Q. Where do your parents live?
A. They live in Covina, California.
[4] Q. Prior to July 26th, 1981 what was your address? Where did you live?
A. I lived in Elfin Acres, Lot 5, in Ogden.
Q. And at that time what was your occupation?
A. I was in the U.S. Army.
Q. And where were you stationed?
A. Fort Riley, Kansas.
Q. And what is your rank in the military?
A. I was Spec-4.
Q. Spec-4?

A. Yes, sir.

Q. Is that equivalent to E-4?

A. E-4, same thing.

Q. Eddie, do you have any kind of a criminal record?

A. The only one I have was I was arrested for D.W.I. in 1978.

Q. And where was that?

A. That was in Anaheim, California.

Q. And other than that D.W.I. have you ever been in any type of trouble prior to July 26, 1981?

A. No, sir.

Q. How long have you been in the military [5] service?

A. I've been in since April 16th of '79.

Q. And how would you describe your military record while you've been in the service?

A. Very good. I haven't been in no trouble at all.

Q. You say no trouble at all?

A. No, I've never been in no trouble at all.

Q. Who is your company commander?

A. Captain Potter.

Q. Eddie, do you know the victim, Arta Kroeplin?

A. No, just from court. That's the only time I've seen her.

Q. Prior to July 26, 1991 did you know Arta Kroeplin at all?

A. No.

Q. Had you ever seen her before?

A. No, sir.

Q. Did you know where she lived?

A. No, sir.

Q. Eddie, do you recall what you were doing in the early morning hours of July 26, 1981?

A. Yes, I was at my trailer at 1 o'clock in the morning and close to 2 o'clock I went to the [6] Mini Mart and purchased a pack of cigarettes.

Q. And where is the Mini Mart located?

A. On Riley Boulevard.

Q. And is that in Ogden also?

A. Yes, sir.

Q. And did you purchase those cigarettes?

A. Well, I went in the Mini Mart and when I pulled out the change in my pocket I didn't have enough change to get a pack so I got back in my car and went back to my trailer.

Q. And what did you do next? What happened next?

A. Well, I stayed at my trailer till about 3 o'clock.

Q. And now we're talking about 3 o'clock in the morning?

A. Right.

Q. And this is July 26th?

A. Right.

Q. And why do you—well, okay, at 3 o'clock what did you do?

A. Well, at 3 o'clock I went and got my car and went up to Elm Street and made a left on Elm Street, went about a block, block and a half, and was involved in a car accident.

[7] Q Now, why do you remember that you left your home at 3 o'clock?

A. Well, I happened to glance at the clock in my trailer that sits on the stand by the door.

Q. And you state then that after you left your home around 3 o'clock that morning you take a left on Elm and a block and a half away you get involved in a car accident?

A. Yes, sir.

Q. After the accident—first of all, were you hurt as a result of the accident?

A. I received a cut under my chin on the left side of my chin right here (indicating).

Q. And did it bleed?

A. It bled quite a bit.

Q. Do you recall if it got on any of your clothing or not?

A. I recall that it got all over my pants and it got on my shirt.

Q. And do you know how you cut your chin in this accident, what cut it?

A. I hit the steering wheel in the car.

Q. After the accident what did you do?

A. Well, after I hit the car I sat in the car for a few minutes and I got out of the car and [8] went into the yard where the guy's car I hit. They were having a party there.

Q. Before we go any further, could you look on the map, State's Exhibit No. 9, and point to me about where this car accident occurred, please, and also point out where your home is in relationship to the car accident?

A. Okay. The car accident was right here.

Q. Where his X is?

A. Right.

Q. And would you put an X roughly where you would estimate your home is in relationship to that, please?

A. Okay. (Witness complied). I'd say right about here, somewhere right here in the middle.

Q. Go ahead and put another small X there, please.

A. Okay (witness complied).

Q. Thank you.

A. Uh-huh.

Q. All right. I believe you testified that after the accident you sat in your car a few minutes. Then what happened?

A. Then I went into the yard where these people were having a party at to find the owner of [9] the car.

Q. And where was this yard in relationship to where the accident took place?

A. Right in front of the house.

Q. And what happened next?

A. Well, I stayed outside for a little while trying to find the owner of the car and I finally found him.

Q. Do you recall who that is now?

A. I recall his name was Adams. I can remember his last name was Adams or his first name.

Q. Do you recall what race he is?

A. He's a black.

Q. So you say you were out in the front yard a while and then you found the owner of that vehicle?

A. Right.

Q. And what happened next?

A. Well, when I saw him and everything he was kind of upset and everything. He said don't say nothing to me, so I didn't. I stayed out in the front yard a little longer.

Q. How long would you estimate the time lapse between the time of the accident and—?

[10] A. I would say about—

Q. Let me finish the question. —between the time of the accident and when you were through talking with Mr. Adams, the owner of the other vehicle?

A. I would say around twenty or thirty minutes.

Q. How long would you estimate time lapsed between the time you left your mobile home and when you were involved in the car accident?

A. No more than two or three minutes. It's not that far.

Q. All right. Then—well, what happened—you were talking to Mr. Adams. Then what happened?

A. This white couple, their next door neighbors, had asked me to come into their house.

Q. Did you know this couple?

A. No, I didn't.

Q. And what did you do?

A. I proceeded over to their house. I went inside. They offered me a wash rag to go in their bathroom and clean up my chin and everything, which I did, and after I cleaned my chin up I sat down on their couch and waited for the police [11] officer to arrive.

Q. Would you have any idea how long you remained in these people's home?

A. I remained in there about ten, fifteen minutes.

Q. Do you remember at all what their names are?

A. At that time I didn't remember.

Q. Now, do you have any knowledge of what their names are?

A. Yes.

Q. What is that, please?

A. Mr. and Mrs. Shatto.

Q. And it's my understanding then you did not know these people prior to the accident.

A. No, I didn't know them.

Q. What, besides cleaning up your chin in their home, did anything else happen in their home?

A. They gave me some potato chips to eat while I was waiting for the cops, the officer to get there, and Mr. Shatto was making some coffee.

Q. And then what happened?

A. And then I waited in their house and I believe it was his wife said that a police officer [12] drove up and that's when I proceeded outside.

Q. When you proceeded outside then what happened?

A. I went up to the police officer and I started talking to him.

Q. Do you recall if anyone's talked to the police officer besides yourself?

A. I believe Mr. Adams did.

Q. Okay, and would you have any estimation of time that the time it was when the police officer arrived?

A. Around 4 o'clock.

Q. Again, we're still in the morning of July the 26th; is that correct?

A. Right.

Q. What happened after that then?

A. Well, I talked to the police officer a while and then he asked me would my car move, if it would start, and I told him no, and he asked me if I could move it and I said I had to go back to my trailer and get some help.

Q. Was that done then?

A. I proceeded on foot to my trailer and got two people and brung them back to the accident and they helped me push my car back.

[13] Q. Do you recall what, if anything, happened the following day then, July the 27th?

A. The following day I got up and went to work as usual and then I came home and I had a message to call Officer Malugani, which I called him.

Q. And what did Officer Malugani indicate to you?

A. He indicated that he wanted to speak to me.

Q. Did he at that time indicate what about?

A. No.

Q. Then what happened?

A. Well, I called him up and he said he'd be down to pick me up. I told him I would talk to him and everything and he said he'd be down to pick me up.

Q. And do you recall approximately what time on July 27th that you were picked up by the police?

A. About 4 o'clock.

Q. In the morning or afternoon?

A. Afternoon.

Q. And this would be on July 27th?

A. Yes.

[14] Q. Do you recall which officers picked you up?

A. It was both Officer Malugani and Officer Johnson.

Q. And at the time they picked you up did they indicate to you whether you were under arrest or not?

A. No, they did not.

Q. Were you served with any kind of warrant at that time?

A. No.

Q. Then what happened then after they picked you up?

A. I was taken to the Riley County Police Department.

Q. And after you arrived at Riley County Police Department what happened?

A. I was placed inside an interview room and asked to sign a Miranda warning.

Q. I show you State's Exhibit 2 and ask you if that is the Miranda warning you signed that day?

A. Yes, it is.

Q. And that's your signature?

A. Yes, it is.

[15] Q. And what time does it indicate that you signed that?

A. 1630 hours.

Q. Okay. Thank you. After you signed the Miranda warning waiver, what took place?

A. (No oral response).

Q. First of all, where did you sign the Miranda?

A. I signed it down here in the right-hand corner.

Q. I mean where, what building?

A. Inside the interview room at Riley County Police Department.

Q. After you signed the waiver what happened?

A. Officer Malugani wanted to talk to me about an incident that happened in Ogden and I asked him was it about the accident, and he said no.

Q. Who was present when Officer Malugani was asking you these questions?

A. Officer Johnson.

Q. Could you explain any of the questions or, excuse me, not explain, but do you remember any of the questions specifically that they asked [16] you?

A. One was he asked me do I have any recollection of the rape that had happened in Ogden. I told him that I didn't know nothing about a rape.

Q. Do you recall any other questions that were asked of you? This is now July 27th we're talking about.

A. After a while he was questioning me and everything. He told me that he believed that I was involved in this incident.

Q. Okay, and anything else happen?

A. He told me that he believed that I was in this incident and if it took—he said he had ten more years on the force and if it took him ten years he'd find me guilty of this.

Q. And how did you respond to that comment?

A. I just told him, I said, "I didn't do this crime that you're committing me of and I wouldn't do something like this."

Q. Can you explain to me what this interview room looks like?

A. It was like was said before, it was about the size of a bathroom. It has four chairs and a table and a door and it has a window. When I [17] first saw it I thought it was a two-way mirror. That's my recollection of it.

Q. And it was draped or not?

A. It was draped.

Q. Can you recall any other questions that were asked you that afternoon about the crimes you are currently being charged with?

A. Officer Malugani at the time—.

Q. Go ahead.

A. Officer Malugani at the time, after he asked me some questions that day in a way already said I was the one that did this and everything and I kept telling them that I didn't commit no crime like this.

Q. Do you recall how long this interview took place, how long?

A. I would say about three hours.

Q. And I believe you testified that the Miranda warning you signed was at 4:30, 1630. That would be 4:30 in the afternoon.

A. Yes, sir.

Q. Do you recall the conduct or demeanor at all of either police officer, Malugani or Johnson, when they conducted that interview with you on July the 27th?

[18] A. Yes, sir. At first it was normal talking, normal conversation, and then Malugani would get upset with me because I wouldn't tell him anything. He'd start raising his voice at me telling me admit that I did this and everything.

Q. Would you give me an example of how you remember his voice was as far as volume or shouting or raising his voice?

A. He goes, "Lowery, I know you did this, now just admit it to me."

Q. And how would you respond to that?

A. I told him I didn't do this, I don't know who did this or anything.

Q. Do you recall at any time whether you were advised you were not under arrest on July 27th?

A. No.

Q. But I believe you stated—well, I'll ask you again. Were you ever advised that you were under arrest on July 27th?

A. No.

Q. On the 27th did you have any personal feeling yourself whether you were or not?

A. I felt I was on the 27th when they were questioning me and everything, when they were [19] telling me that they did think I did commit this.

Q. Why did you feel that even though you signed the Miranda warning waiver?

A. I felt because the way they were questioning me and everything, I felt that I couldn't leave or anything, that I was going to be arrested, you know.

Q. After this interview was completed, what happened?

A. They asked me to sign a search warrant.

Q. You don't mean a search warrant.

A. A voluntary search warrant.

Q. And did you do that?

A. Yes, I did.

Q. And after you signed that search warrant, what happened? Excuse me, waiver of search, excuse me, what happened?

A. We went back to my trailer in Ogden and Investigator Malugani and Johnson searched my car and my trailer.

Q. And do you recall if they took any items into evidence?

A. Out of my car they took a knife, a brown handled knife. Out of my trailer they took a pair of white pants.

[20] Q. Is that all you recollect that was taken on the 27th of July?

A. 27th, yes.

Q. Can you explain why that knife was in your trunk? Do you remember how it got there?

A. I was hooking some speakers up in my car at one time using a knife to splice the wires with and I must have just left it in there. When they found it it was under the spare tire and everything.

Q. These pants that the police officers took into evidence, were those the ones you were wearing on the 26th of July or you told them you were wearing that night?

A. Yes.

Q. Do you recollect the condition that those pants were in when the police officers took them into evidence?

A. They were dirty and had blood on them.

Q. And what is your testimony as far as how blood got there?

A. It happened when I was involved in my automobile accident.

Q. When they completed their search and were ready to leave, did they indicate at all they [21] wanted to see you the following morning?

A. Yes, they asked me if I could come back the next day in the morning.

Q. And what did you say?

A. I said I would.

Q. Did you, in fact, go to the police station the following morning, that would be July 28th?

A. Yes, I called them up and told them I didn't have no transportation and Mr. Malugani came down and picked me up.

Q. At the time Mr. Malugani picked you up that morning, first of all, do you recollect the time that he came and picked you up?

A. It was about 7:30.

Q. At that time were you placed under arrest?

A. No.

Q. At that time were you advised that you were not under arrest?

A. No.

Q. What happened next after he picked you up?

A. He took me up to the Riley County Police Department and put me inside an interview room.

[22] Q. Would this be the same type of interview room that you described that you were questioned in on July 27th?

A. Yes, sir.

Q. After you went into this interview room, what happened?

A. I was seated inside the interview room and Mr. Malugani asked me to sign another Miranda warning.

Q. And did you do that?

A. Yes, I did.

Q. And I hand you here what's been marked State's Exhibit No. 26 and ask you to identify that.

A. This is the Miranda warning that I signed on the 28th.

Q. And that's a waiver; is that right?

A. Right.

Q. And that's your signature on that document?

A. Yes, sir.

Q. And what time does it indicate that you signed that one?

A. 0851.

Q. After you signed the Miranda warning [23] waiver, what happened?

A. Mr. Malugani questioned me for a little while.

Q. Who was present when he did that?

A. Mr. Malugani and Mr. Johnson.

Q. Can you recollect any questions, specific questions that were asked at that time?

A. He'd asked me if I'd changed my mind about what was said the day before. I told him that no, that I haven't changed my mind, that I still don't know nothing about this crime and everything.

Q. Then what happened?

A. Then they asked me if I wanted to talk to Officer Raynor.

Q. And did you talk with him?

A. Yes.

Q. And how long did you talk with Officer Raynor, do you recall?

A. About three hours.

Q. And after you were through talking with—well, before or after you talked with Officer Raynor do you recall ever asking for an attorney?

A. I asked for an attorney before I talked to Officer Raynor. I asked Officer Malugani if I [24] could see a lawyer and he goes, "There's no need for one right now. All we want to do is ask you a few questions," and I said okay.

Q. So your testimony is you specifically asked for an attorney prior to talking with Officer Raynor?

A. Yes, I did.

Q. And the person you asked that of was Officer Malugani?

A. Yes.

Q. And he stated that you didn't need one at that time?

A. He said he just wanted to ask me some questions.

Q. After Sergeant Raynor interviewed you, what happened?

A. Officer Malugani and Officer Johnson took me back over to Riley County Police Department and put me in the interview room again.

Q. And what happened after you arrived back to the interview room?

A. At that time Officer Malugani had told me that he believed I have done this crime and that if I would admit it he would get me help. He was saying that I was having mental problems with my [25] head and that if I admit this and everything he would get me help.

Q. And do you recall if anyone else was present in the interview room besides you and Officer Malugani at that time?

A. Officer Johnson was in there too.

Q. Do you recall approximately what time the interview between you, Officer Malugani, and Officer Johnson took place after you were through talking with Officer Raynor?

A. It was between 12:45 and 1 o'clock, around there.

Q. Do you recall whether you had had anything to eat at all that day up to when the interview began around 12:45 or 1 o'clock?

A. No, I didn't have nothing to eat.

Q. Why not, do you remember?

A. Well, in the morning when I got up I woke up kind of late and everything and they did ask me to be there at 8 o'clock so when I got up there I was never offered no food or I never did say I wanted food.

Q. Were you ever offered food at all during the day of July 28th until you were finally arrested later that afternoon?

[26] A. The only thing I was offered was coffee.

Q. Could you describe the conduct or demeanor of the police officers when they were questioning you the afternoon of July 28th?

A. At first, you know, it was like before. They start off normal talk. Mr. Malugani was trying to get me to confess to something I didn't do, telling me if I did confess he would get me help and stuff, and after a while after I wouldn't say nothing Malugani would get loud with me.

Q. What do you mean by loud?

A. He would raise his voice at me.

Q. Would it be the type of inflection in your voice you indicated earlier here in court?

A. Yes.

Q. Was Doug Johnson ever present when Officer Malugani would raise his voice?

A. Yes.

Q. Do you recall any of the questions or comments Officer Malugani or Johnson directed towards you during that interview that afternoon?

A. Mr. Malugani was doing most of the questioning and he told me that he believed that I had done this crime and that if I admitted it he would get me help and that he had a hundred [27] percent conviction on me now that he would convict me of this crime. He was mostly, you know, telling me to admit to this crime that I did this, really pressuring me really hard to admit that I did this.

Q. Then what happened?

A. Well, after a while I'd say after a couple hours I would—I was still denying that I wasn't the one that did this and everything and then it got to a point

where I started crying. got really emotionally upset about all this and everything. I kept on, you know, thinking, you know, why would they think I did this when I know I didn't do this. I kept telling them I didn't do this, I didn't do this, and Malugani kept on telling me, "You did this. If you don't admit you did this, we're going to lay the hardest conviction at you that we can send you to prison as long as you can and if you cooperate with us and tell us that you did this that we'd get you help, send you somewhere where you can get your head straight."

Q. All right, and after that questioning what happened?

A. I finally—well, I was really [28] emotionally upset. I was crying and everything. I finally told them, you know, I finally just told them, you know, what happened.

Q. And can you explain how you told them what happened?

A. Mr. Malugani asked me, after I went to—he said, "You went to the Mini Mart." said, "Yes," And he goes, "Did you go driving around?" and at that time I was really upset and I said, "Yeah, I went driving around," and he said, "Did you go up to this lady's house and park the car?" And I said, "I went up there and I parked the car." And he goes, "Then what?" And I wouldn't say anything. I just set there and wouldn't say anything, and he goes, "Did you go up to the door?" I go, "Yes, I went up to the front door."

Q. You said front door?

A. Yes, I told him I went up to the front door. He goes, "How did you get in?" I go—he goes, "Did you cut the screen?" I said, "No, I just busted it down with my hands."

Q. Why did you say that?

A. It sounded like the thing to say.

Q. Then what happened?

[29] A. I told him that I went into the living room and then into the kitchen. I was rumbling around in there.

Q. Then what happened, or what did they ask you or what did you say?

A. After that, you know, I was—I was really—I was crying and everything. I didn't know what to say and everything. I was really upset and at that time he goes, "Well, what happened after that, Lowery? Did you hear anything?" And I told them, I go, "I heard a noise down the hall," and I told them I went down the hall and down the hallway into a bedroom and then he goes, "Then what happened?" And I just said, "Well, I jumped on her," and he goes, "What happened after that?" and I stopped and I didn't know what to say, and he goes, "Did you hit her with anything, did you hit her with the vase or did you hit her with the butt of a knife?" I said, "Well, I hit her with the butt of the knife," and he goes, "What happened after that?" And I told him, I go, "Well, I raped her."

Q. How long of a time span would you estimate that that occurred, that you were involved in actual certain admissions that you [30] made? How long did it take to obtain that information?

A. Before I would admit anything after talking to Officer Raynor they were really pressuring me for about an hour, hour and a half, trying to get me to admit to this and telling me what they would do for me if I admit to doing this and I would say it took them about a couple hours through the whole admission and everything.

Q. Okay. Were you telling the truth when you made those admissions?

A. About the incident that happened?

Q. Yes.

A. Yes, I was telling the truth. I was telling them that I didn't do this and everything.

Q. I mean, when you went into the actual admissions?

A. No, I made up the whole story just so that they would leave me alone and they would get off my back and everything.

Q. And how did you construct this story if you actually did not commit these crimes?

A. I just conducted it from what I learned about a knife, you know, I didn't know that didn't know until —you know, I guess when [31] somebody breaks through a house they go through the front door or something, you know. I just used my own imagination about it.

Q. How did you make the admissions or come up with the rooms you went through in the home?

A. At that time when I told them that I was describing my trailer to them.

Q. You didn't tell them that, though; is that right?

A. No, I just used my trailer.

Q. You're saying you used it as an example of the rooms you went through—?

A. Right.

Q. —during that admission?

A. Right.

Q. And you stated, though, that these admissions you made are, in fact, not true?

A. That's right, they're not true at all. All I did was made up a big lie to tell them so that they would leave me alone and quit hollering at me and quit saying that I need help in my head, that I'm emotionally disturbed and stuff like that.

Q. Do you recall if at any time, either on the 27th or 28th, if you ever requested to stop [32] the interview and ask for an attorney?

A. I requested a lawyer before I talked to Officer Raynor and the only thing Officer Malugani told me was we don't need one right now, all we want to do is ask you a few more questions and I thought okay.

Q. After these—well, first of all, can you describe the conduct and demeanor of the police officers during the time period that you were making these admissions? We talked about earlier. Now just specifically during this time frame of the admissions.

A. Officer Johnson wasn't really saying too much. Officer Malugani was upset with me and everything because I wasn't saying things as fast as he wanted me to and everything. I wasn't admitting to stuff, you know, fast and accurately and he'd get upset with me. Like I told him—when I told him I was standing in the bedroom he told me, "Then what happened? C'mon, Lowery, you're almost there. Just tell us what happened," and I'd hold my head down and everything because I was crying and upset about this whole thing and finally I said, "Well, I jumped on the bed," and then he said, "Tell us what happened, you're [33] almost there, what did you do, hit her with a knife or with a vase?" I go, "I hit her with a knife," and he goes, "Did you hit her with the butt of the knife?" And I go, "Yeah." And he was really loud with me a lot.

Q. After you made these admissions, what happened next?

A. They took me back to my trailer which they obtained my shirt out of the washing machine.

Q. I hand what's been marked Defendant's Exhibit B and ask you if you can identify that, please.

A. This is the shirt they got from my washing machine.

Q. And is that the shirt you're saying that you were wearing the morning of July the 26th?

A. Yes, it was.

Q. I also hand you what's been marked Defendant's Exhibit C, and I believe you testified earlier that on July the 27th that Officer Malugani and Officer Johnson, after you signed the search waiver, picked up a knife in your trunk of the car and also a pair of pants.

A. Right.

Q. Can you identify this exhibit, please?

[34] A. These are the pants that I was wearing the night of my automobile accident and the day they picked those up those are the pants they got.

Q. After you made these oral admissions to the police officers, what happened?

A. That's when they took me back to Ogden to pick up my shirt.

Q. Before they did that did they do anything else?

A. I asked for a break after that.

Q. And did you have a break?

A. Yes, I did.

Q. Do you have any idea how long that break lasted?

A. Ten or fifteen minutes.

Q. Where were you during the break period?

A. Inside the interview room.

Q. And who else was in there beside you?

A. I was in there by myself.

Q. After the break was over what happened?

A. Officer Malugani and Officer Johnson came back in there and asked me if I would sign another Miranda warning and asked me if I would write down

what I said or if I would—or if it would be easier saying it into a tape recorder.

[35] Q. And what did you say?

A. I told them I didn't want to say anything at that time, that I wanted to see a lawyer, and I asked them for another lawyer again and at that time they placed me under arrest.

Q. Do you recall approximately what time you were placed under arrest?

A. 4 o'clock, somewhere around there.

Q. After you were placed under arrest, what happened?

A. I was taken to my mobile home to get my shirt brung back and taken over to the jail cell. I was fingerprinted, mug shots, and placed inside a cell.

MR. VOGEL: I have no other questions, Your Honor.

CROSS EXAMINATION

BY MR. CAFFEY:

Q. Mr. Lowery, on the 26th of July of this year, the early morning hours, had you been drinking?

A. Yes, I was.

Q. So at the time you had your automobile accident you had been drinking?

A. Yes, I was.

[36] Q. When the police officer came out to the scene and investigated the scene did he give you some field sobriety tests?

A. Yes, he did.

Q. Were you cited for driving under the influence?

A. No, sir.

Q. I assume you passed the field sobriety tests.

A. Yes, sir.

Q. Would you say that you were drunk at the time?

A. No, sir.

Q. Would you say that you had had a substantial amount of alcohol, however?

A. No, sir.

Q. At that time were you distraught or upset?

A. At the time of the accident?

Q. Yes.

A. I was emotionally—yes.

Q. Was that as a result of the accident?

A. I don't know if it was or not. I didn't see the car when I hit it.

Q. How fast were you driving when you hit [37] the car?

A. Twenty, twenty-five, I guess. I don't know. I have no recollection. I didn't look at the speedometer.

Q. Where was the car when you hit it?

A. It was parked off to the side of the road.

Q. Did you tell the officer that it was parked in the middle of the road?

A. I told him it was parked pretty close to the road, you know, so I'd say it was parked in the middle of the road.

Q. But, in fact, it was parked along a side of the road?

A. It was parked alongside of the road.

Q. Isn't it true that your automobile was totally destroyed?

A. The front end was, yes.

Q. You weren't able to repair it at all?

A. I don't know.

Q. But the repairs would exceed the value of the car?

A. It might have, I don't know. I never got a chance to have it estimated or anything.

Q. Pretty serious damage to your vehicle, [38] wasn't it?

A. Yes, the fender was dented.

Q. More than a fender dented, wasn't it? You couldn't drive it, could you?

A. Well, the front end was pushed back, yes.

Q. And this was about a block or block and a half away from your residence?

A. Yes, sir.

Q. You apparently had enough of an impact with this car that it threw you forward and you hit your chin on the steering wheel.

A. Yes, sir.

Q. So there was a substantial impact, was there not?

A. There must have been, yes.

Q. And you found Mr. Adams and you had a conversation. Do you know how the police were called?

A. I didn't know at first but after a while I found out that somebody called them.

Q. And then you went to the Shattos' house and waited till the police officer arrived?

A. Right.

Q. On the 27th, the next day, you received a call from Investigator Malugani and he picked you [39] up around 4 o'clock, you said, and you were taken to the police department. At that time were you in handcuffs?

A. No, sir.

Q. When you went to the police department did they put you in a locked room or anything?

A. I didn't know if it was locked or not.

Q. Did anybody restrain you in any way?

A. No, sir.

Q. And then you had a conversation with Investigator Malugani and you told him about your activities on the 26th, the early morning hours of the 26th; is that right?

A. Yes.

Q. And apparently he took issue with some of the things you told him.

A. Yes.

Q. Is that a safe way to say that?

A. What are you talking about now?

Q. Well, he disagreed with some of the things you told him?

A. Yes, he did.

Q. Didn't you initially deny that you had been to the Mini Mart?

A. I told him that I was there. Some of the [40] questioning that went on inside the Mini Mart I told him I denied because I don't remember what went on inside.

Q. You didn't tell him initially that you were not at the Mini Mart?

A. No.

Q. And he didn't then confront you with someone else's statement that said you were at the Mini Mart?

A. He told me, he said that someone at the Mini Mart identified me being in there at the Mini Mart and I told him that I did go to the Mini Mart.

Q. And that was what time?

A. Pretty close to 2 o'clock, around 2:00.

Q. And you hadn't told him initially that you hadn't been at the Mini Mart then?

A. I told him I was at the Mini Mart, yes.

Q. But first before he said that, before he confronted you with that, is it not true that you told him you were not at the Mini Mart?

A. No, sir.

Q. That you had been at your trailer all that time?

A. No, sir.

[41] Q. And then somewhere along the line that day, on the 27th, he made the statement that he believed that you had done this and that if it took him ten years, or he had ten years left on the force and if it took him ten years he'd prove it; is that right?

A. He certainly did.

Q. Did you think you were under arrest at that time?

A. I didn't know what to think at the time.

Q. They took you home that evening, didn't they?

A. Yes.

Q. They let you stay in your home, didn't they?

A. Yes.

Q. You didn't think you were under arrest then, did you?

A. Not after they took me home I didn't.

Q. Okay. Then you let them search your vehicle and your house and they got two items?

A. Yes, sir.

Q. Another item they retrieved later at another time?

A. Yes, sir.

[42] Q. The next morning they asked you to come in?

A. Yes, sir.

Q. Did you come in voluntarily?

A. Yes, sir.

Q. So you knew at that time you weren't under arrest, didn't you?

A. Yes, sir.

Q. You called them, in fact?

A. He asked me if I would come back the next day and I said yes. I told him I might have to find a ride and he said, "If you can't find a ride, call me."

Q. And you did, didn't you?

A. I called him, yes.

Q. And you said you signed another Miranda warning at 8:51 a.m.; is that right?

A. Yes, sir.

Q. Now, I show you here State's Exhibit 26. Is that what you signed that morning?

A. Yes, sir.

Q. And before you signed that was it read to you?

A. Yes, sir.

Q. So you heard it verbally, then did you [43] read it?

A. He read it to me, he set down on the table and read it off and asked me if I'd put my initials by each of questions.

Q. You knew what you were signing, yes?

A. At the time, yes.

Q. Say that again.

A. At the time, yes.

Q. So you understood the Miranda warning?

A. Well, you could say that, yes.

Q. Well, you're the one I'm asking. You said you understood what was in it, didn't you?

A. Well, when he was saying it. From what I recollect, I was going along with him to help him along because he asked me to cooperate and I said yes.

Q. At that point you had at least twice been read this and had read it yourself; is that right?

A. Right.

Q. On the 27th and on the 28th?

A. Right.

Q Do you consider yourself to be of normal intelligence?

A. Yes.

Q. You're a Spec-4 in the Army; is that [44] right?

A. Yes.

Q. To have reached the rank of Spec-4 in the Army it would be pretty hard for someone who could not read or was of less than normal intelligence to be advanced four grades in the Army, wouldn't it?

A. It depends on your job.

Q. Now, at the time of this conversation with Investigator Malugani and the time you signed this rights waiver form, is it not true that Investigator Malugani told you then that you were not under arrest?

A. I asked him sometime during the conversation but I don't know, he didn't come right out and tell me that I was not under arrest.

Q. He didn't tell you that?

A. No, sir.

Q. And you asked to see a lawyer?

A. Yes, sir.

Q. Do you remember testifying [45] at a previous hearing in this court? Do you remember testifying before this court in a previous action?

A. That I asked for a lawyer?

Q. Do you remember that you have testified once previously in a previous action in this case?

A. Yes.

Q. I'm going to read you some testimony here and see if you remember it.

A. Okay.

THE COURT: Refer to the deposition page and number.

Q. I'm reading from Page 69 of the transcript of the Defendant's Motion to Suppress Confession. Your testimony: "I did ask Malugani if I could see a lawyer and he told me that there's no probable cause for one right now because I wasn't under arrest or anything."

A. Right.

Q. Now, you're saying he didn't tell you that you weren't—

A. I asked for a lawyer and he said there was no need for one right now. He did tell me that no, I wasn't under arrest or anything.

Q. You can't have it both ways, either that conversation occurred or it didn't.

A. He asked me—I asked him if I could talk to a lawyer and he told me there was no need for one right now, we just want to ask you [46] questions, and I wasn't under arrest.

Q. So he did specifically tell you you were not under arrest?

A. Right.

Q. Well, you just a minute ago said he didn't.

A. I said he didn't come out and tell me that. I think—.

Q. Well, we won't argue about that. Now, you admit that you never asked them to have any food, you didn't tell them that you were hungry and that you wanted to eat, and they were starving you or anything like that?

A. No.

Q. Did they ever do anything to prevent you from having food?

A. No.

Q. And in the morning you could have eaten breakfast before you came in?

A. I could have, right.

Q. They didn't do anything to prevent that, did they?

A. No, sir.

Q. You said that you started crying at some point in there. If I recall correctly, Officers [47] Malugani and Johnson have indicated that they did not observe you crying, that you were at one point distraught or

upset, perhaps appearing to feel guilty but they don't recall you having cried.

A. Well, if I remember correctly, I did start crying at the time of all this that was going on.

Q. And then you said you told them what happened?

A. Is that right?

Q. That's what you said here in the courtroom, after you started crying you told them that you drove up to the victim's residence and then you indicated that you were prompted after that; is that correct?

A. I told them that after—that after, you know, they started saying, you know, admit it that you did this, we know you did this, Lowery, you know.

Q. Well, you did tell them you did it, yes?

A. I admitted it, yes.

Q. Okay. Now, the testimony previously has been, and you've set here in the courtroom and heard it, that you told these officers that you went to a white house on the corner.

[48] A. I never said white house.

Q. You didn't tell them that?

A. No, I didn't.

Q. And that you parked on the side. You told them that, didn't you?

A. I told them I parked. I don't know where to park at, so I just say I parked.

Q. You say you told them that you went around the front, they say it was the back?

A. Right.

Q. And you admit that you told them you tore the screen door open?

A. Yes.

Q. And that was without any prompting, you said.

A. I just said I ripped down the screen door and busted the front door open.

Q. And they asked you if you did it with your hand or with a knife, right?

A. Right.

Q. And you said you did it with your hand?

A. Right.

Q. You admit that you told them that?

A. Right.

Q. Now, if you hadn't done it couldn't you [49] have said no, I didn't do it. I didn't tear it with anything?

A. I was telling them through this whole thing that I didn't do this and they kept on saying, Lowery, you did this, you did this, we know you did this.

Q. And after you told them you tore the screen door open you then told them you didn't do it with either because I wasn't there?

A. No, but before that.

Q. Well, you were free to say I didn't do it with either, I wasn't there.

A. I tried telling them this but they wouldn't listen to me.

Q. At that point?

A. At that point there was no use trying to tell them anything. They were so upset with me trying to get me to admit that I did this.

Q. And they said that you indicated that you tore the screen door open, then you unlocked the door and went inside.

A. I said I busted the door.

Q. And you're saying that's not what you told them?

A. No, I said I busted the screen door down [50] and went inside the living room.

Q. And you told them you were doing this with the intent to burglarize?

A. That's what they said. I go—they said, "Were you going to burglarize the house or something," and I go, "Yeah."

Q. Well then you did say—

A. After they had told me.

Q. And they said that you told them you entered the kitchen, is that accurate, did you tell them that?

A. From the living room into the kitchen.

Q. You said from the living room into the kitchen?

A. Right.

Q. And that you picked up a knife in the kitchen?

A. Yes, they said, "Did you pick up anything?" and I go, "Well, I picked up a knife."

Q. Okay, that you walked down a hall and were rumbling around?

A. I said I rumbled around in the kitchen and living room and then I heard a noise down the hall and I walked down a hall into the bedroom.

Q. And you said you heard someone stir?

[51] A. Yes.

Q. So you admit that you said that?

A. Yes.

Q. And you also admit that you told them that then you jumped on the bed and you held the pillow or covers over this person?

A. They asked me did I throw anything over her face like a pillow or covers, and I said, "Well, I threw covers over her face."

Q. You didn't tell them no I didn't because I wasn't there?

A. I told you at the starting of this I tried telling them I didn't do this and everything and they had me so upset at the time I was crying and everything telling me I did this, telling me I was having mental problems. I'd like to see you go through this.

Q. You knew you weren't under arrest at that time, didn't you?

A. At that time I didn't know what to think, you know. I wasn't even thinking about being arrested at that time.

Q. You said before this you had been told that you were not under arrest. I'd like you to read this portion right here of the State's [52] Exhibit No. 25. Can you read it out loud?

A. "If you decide to answer questions now without a lawyer present you will still have the right to stop answering at any time. You also have the right to stop answering at any time until you talk to a lawyer."

Q. You had been informed of that and you understood it?

A. Well, at the time I was going—just going along with the officers, you know, helping them.

Q. So you admit that you lied to the officers then?

A. About the incident, my statement, yes, just so they would leave me alone.

Q. Well, tell me this. If you would lie to those officers just because you're in a little room and they're talking to you and you've been there a few hours, what's this jury to think? Why should this jury believe that you're not lying to them to keep from going to prison?

A. Because I'm not lying to them. I lied to them because of the way they were hassling me and stuff.

Q. You admit that you told the police [53] officers that the victim was wearing a gown; is that correct?

A. I told them—I think I told them that she was wearing pajamas, you know, or something.

Q. You thought you said pajamas?

A. Or a gown, I don't know. It was probably a gown.

Q. Do you recall in previous testimony at the same hearing that we talked about earlier—?

A. Right.

MR. CAFFEY: This is on Page 86, Your Honor.

Q. Your testimony: "They asked me if she was wearing pajamas or a nightgown and I just told them nightgown."

A. Right.

Q. So you did tell them nightgown?

A. Right.

Q. Do you recall that you told them that you hit her a couple of times with the butt of a knife?

A. They asked me if I hit her with a vase or the butt of the knife.

Q. And you chose knife?

A. I chose knife.

[54] Q. And they asked and you told them that you hit her in the head a couple of times?

A. They told me that, yes.

Q. Now, there have been two police officers here that said that they didn't prompt you in any way.

A. Right.

Q. And you're saying that they are absolutely lying. They said you undid your pants and, in your words, "screwed her"?

A. Yes.

Q. Is that what you told them?

A. Yes.

Q. And then you ran out the door and drove away?

A. Right.

Q. You told them that also?

A. Right.

Q. And that was all a lie?

A. Yes.

Q. Then they had you gone through it again?

A. They only went through it one time.

Q. They didn't go through it twice?

A. No, they didn't go through it twice.

Q. Is it not true that they then took a [55] break?

A. After the statement was done and everything they took about a fifteen-minute break and they came back in and asked me to go through it again and I told them no, I didn't want to and they said, "Would you write it down or state it into a tape recorder?"

Q. At that time you invoked your right to have an attorney present; is that correct?

A. I asked for a lawyer then too.

Q. They didn't ask you any more questions after you asked for a lawyer, did they?

A. Not at that time, no, they arrested me.

Q. They arrested you at that time because you'd admitted three crimes, isn't that true?

A. Right.

MR. CAFFEY: I have no other questions at this time, Your Honor.

MR. VOGEL: I have no other questions, Your Honor.

APPENDIX G

[236] THE COURT: Mr. Vogel, are you ready to proceed, sir?

MR. VOGEL: Yes, Your Honor, I'd like to call Eddie Lowery to the stand please.

EDDIE LOWERY,

called as a witness in his own behalf, being of legal age and having been first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. VOGEL:

Q. Would you state your name please?
A. Eddie James Lowery.
Q. And how old are you?
A. 22.
Q. And what is your educational level?
A. High school graduate.
Q. And do you understand that in a criminal case such as this you are not required to testify?
A. Yes, I do.
Q. And you so desire to testify here today?
A. Yes, sir.
Q. What was your address, in other words, where were you living on July 26, 1981?
A. I was living at Elfin Acres, Lot 60, Elm Street,
Q. Could you go over and look at I believe it's State's [237] exhibit 1, a map of Ogden and show me where you live please? Why don't you go ahead and nark it with a B so we can distinguish the two.
A. I think it's right here.
Q. Make it pretty large and 'bold so that the jury can easily look at that. Thank you:

(The witness complied with the request.)

Q. Prior to being charged with the offenses you're now in court about, did you have any criminal record at all?

A. Uh, If had a D.W.I. in '78 but that was the only one.

Q. Other than that D.W.I. have you been in any type of criminal trouble?

A. No, sir.

Q. You have no misdemeanor or felony convictions against you

A. No, sir.

Q. And where are you employed?

A. I was employed at United States Army.

Q. And what was your rank?

A. Sp-4.

Q. How long had you been in the military service?

A. Since April 16th, 1979.

Q. And during the period of time you were in the military service, did you receive any type of Article 15's or any other company or higher grade offenses or violations on your record?

[238] A. No, sir.

Q. flow long had you been stationed at Fort Riley?

A. Since August,

Q. And how long had you lived at this Elfin Trailer Court?

A. Since August of '79.

Q. Prior to being charged with these crimes you're now testifying about did you know Arta Kroeplin?

A. No, sir.

Q. Did you know where she lived?

A. No, sir.-

Q. Do you recall what, if anything, happened on the morning of July 26, 1981?

A. Okay.

Q. Starting around, let's say approximately 1:00 o'clock in the morning.

Q. Oh, okay, that morning I was at my trailer with some -friends and I said I was going to go to the Mini-Mart and buy a pack of cigarettes,

Q. Did you do that?

A. Yes, sir, I. went up to the Mini-Mart to get a pack of cigarettes and returned to my trailer within- - 15 Minutes.

Q. And after you returned to your trailer what 'happened next?

A. I stayed at my trailer till approximately 3:00 o'clock.

Q. And then what happened, if anything?

A. I left my trailer, I can show you on the map.

[239] Q. All right.

A. I left my trailer at 3;00 o'clock and I live right here and this is a dirt road and I proceeded up this dirt road to Elm Street and made a left on Elm Street and went two blocks and was involved in a car accident.

Q. And the car accident happened where it is marked A?

A. Right here (pointing).

Q. What was the reason for leaving your mobile home around 3:00 o'clock that morning?

A. I was going down to the river.

Q. And why were you doing that?

A. I've had some family problems and I was just getting away from the people around my trailer.

Q. Do you recall then or would you have any recollection on approximately what time you were involved in this car accident?

A. About 5 minutes after 3:00.

Q. All right. Do you know whose vehicle you hit?

A. I didn't know at the time,

Q. Do you know who now?

A. Yes, I do now.

Q. And do you recall his name?

A. Charles Adams.

Q. After you collided with this other car belonging to Charles Adams, What happened?

[240] A. After I hit his car I set in my car for a few minutes and that's after—I was sitting in my car and I took shirt off.

Q. Why did you take your shirt off?

A. I had a scar right here where I hit my chin on the steering wheel.

Q. You hurt your chin as a result of the accident?

A. Yes, I hit it on the steering wheel.

Q. Were you bleeding?

A. I was bleeding pretty bad.

Q. So you took your shirt off for what reason?

A. I sit in the car and threw my shirt down on the passenger, seat of the car and I got out of the car and checked the front end of my car and went over to his car and then I went in the yard where these people were having a party. I guess that's where the owner of the car was at.

Q. Do you recall if there was anyone in this vehicle that you hit when you hit it?

A. There was nobody in it.

Q. It was a parked car?

A. Yes, sir.

Q. Was there any reason why you hit that car, do you know what happened there?

A. I didn't see the car. There was no street lights there or anything and I didn't see the car and hit the back of it

[241] Q. Then after you got out of your car and looked at your own car and the car belonging to Mr. Adams, what happened?

A. I went in the front yard and asked some people if they knew whose car that was that I hit.

Q. Did you find out who it was?

A. Yes, I did about 5 or 10 minutes.

Q. Then what happened?

A. After I found out whose car it was Mr. Adams came up to and said he didn't want to talk to me about it right now because he was upset and after he said that, he, he left and Mr. Shatto called me over to his house.

Q. And where did Mr. Shatto—did you know Mr. Shatto prior to this accident at all?

A. No, sir.

Q. Where did—without going back to the map, can you verbally explain roughly where Mr. Shatto lived in relationship to where the accident occurred?

A. Mr. Shatto lived, I think it was just two doors over from where the accident occurred.

Q. And the accident occurred at approximately 7th and Elm, is that right?

A. Right, yes, sir.

Q. So you're stating that Mr. Shatto offered for you to come into his home. Did you do that?

A. Yes, I went to his home.

[242] Q. And what did you do in there?

A. I went in there and asked him if I could clean up in, his bathroom so he a wash rag.

Q. What was the reason you wanted to clean up?

A. Because I was bleeding all over myself again.

Q. Okay.

A. And I went into the bathroom and washed my chin to try to stop it from bleeding and when I got it slowed down from bleeding I put the wash rag in the sink and I went to his living room and asked him for some gum but he didn't have any and he offered

me some potato chips so I set down and was eating potato chips.

Q. After that what, if anything, happened?

A. After I set on the couch his wife said that there was a police officer out there and that's when I proceeded outside.

Q. Would you have any estimation on time as to when you went outside to talk to the police officer?

A. How long I was in the house for?

Q. Let's put it this way, do you recall how long after the accident occurred that you were either outside talking with Mr. Adams or in Mr. Shatto's home?

A. I believe the accident happened about 5 minutes after 3:01 and the officer arrived about 10 minutes before 4:00 so about an hour almost, not quite an hour.

[243] Q. So after Mrs. Shatto informed you that the police arrived then what did you do?

A. I went outside and I was—I talked to the police officer.

Q. Do you recall if you had your shirt back on when you were in the Shatto's home?

A. No, I didn't. I never put it back on after took it off.

Q. So after leaving the Shatto's hone you state that you went outside to talk to the police officer?

A. Yes, sir.

Q. is this Officer Davis that previously testified?

A. Officer Davis.

Q. Okay, Officer Davis stated that the way he obtained the time the accident occurred was after talking with you and Mr. Adams. Do you recall being asked what time the accident occurred?

A. I don't recall being asked what time the accident occurred because I was a little upset and everything, you know, because of the accident and

everything and the only thing. I remember him asking me is to get a tow truck to call somebody to hall my car away and I asked if I could go up to my trailer and get some friends to help me push the car back up.

Q. Do you recall what type of pants you were wearing that night?

[244] A. White pants.

Q. I hand you what has been marked State's exhibit 20. You stated that you were wearing a shirt and after you were involved in this accident and before getting out of the car you took the shirt off to wipe the blood off of you, is that right?

A. Right, yes, sir.

Q. Do you recognize that as being the shirt you're talking about?

A. Yes, sir, this is the shirt that I was wearing.

Q. Okay and you stated that you were wearing a pair of whit pants. I hand you what's been marked State's exhibit 21 and see if you can recognize this exhibit as the pants you were wearing the morning of July the 26th?

A. These are the pants that I was wearing on the 26th.

Q. And do you recall if you had blood both on the shirt and on your pants as a result of that car accident?

A. Yes, sir, I was bleeding pretty bad. I had blood all myself.

Q. I believe you then testified or stated that approximately 5 or 10 till 4:00 is when Officer Davis arrived at the scene to investigate the accident?

A. Yes, Sir.

Q. Then let's move on to the July 27th, the next days

A. All right.

[245] Q. Of 1981. Do you recall what if anything happened that day?

A. Yes, I went to work that morning, Monday morning, came home that afternoon and I had a message to call Investigator Malugani.

Q. Did you know Investigator Malugini at all prior to receiving this message to call him?

A. No, sir.

Q. Did you then place that call?

A. Yes, sir.

Q: And what resulted from that call?

A. I called him and he asked me if he could come down and talk to me or if I could come up to the police station and talk to him. I told him I didn't have no transportation and he said he'd be down to pick me up.

Q. Did he in fact come down and pick you up?

A. Yes, sir.

Q. Was anyone else with him when he did that?

A. Investigator Johnson.

Q. Did you know Investigator Johnson at all prior to that morning?

A. No, sir.

Q. Do you recall what conversation if any transpired between you and the two policemen when they first came to pick you up the afternoon of July 27th?

A. They just—they came 'down there and just asked me if I [246] could come up to the Police station and talk to them about the accident I had the previous night and I said sure.

Q. Do you recall approximately what time it was when the policemen came to pick you up that day?

A. I believe it was about 4:00 o'clock that afternoon.

Q. At the time they picked you up were you advised at all that you were under arrest?

A. No, sir.

Q. And after being transported by the police officers to the

Riley County Police Department, what happened?

A. I was placed inside an, interview room. Investigator Johnson and Malugani Came in there with me and handed me a Miranda warning to sign.

Q. Before we talk about the Miranda warning, can you just briefly describe what the interview room was like?

A. It was, a square room with a table in the middle of it with two chairs on each side of the table.

Q. Do you have any idea what size it was?

A. I couldn't guess by feet but I would say about the size of a bathroom.

Q. Do you recall if there were any windows in it?

A. I noticed one window which I took as a one-way mirror.

Q. Then you stated that you were handed or read your rights, your Miranda rights, is that correct?

[247] A. Yes, sir.

Q. Do you recall who read those rights to you?

A. Officer Malugani.

Q. I hand you what's marked State's exhibit number 18, is this the waiver of rights form that you signed on July the 27th?

A. Yes, sir.

Q. And what time does it indicate on that?

A. 1630 hours.

Q. Okay, so that would be 4:30 in the afternoon, is that right?

A. Yes, sir.

Q. After you signed this waiver of rights form, what happend?

A. Officer Malugani and Investigator Malugani and Investigator Johnson started asking me ques-

tions about rape charges, a rape crime that was committed and I asked them, I go, "I thought you were 'going to talk to me about the car accident." And they said that ain't what they wanted to talk to me abut because that ain't in their jurisdiction

Q. Do you recall any of the specific questions that were asked of you that afternoon on July 27th by either Officer Malugani or Johnson?

A. They asked me if had any idea of a rape that was committed that—early hours of the 26th and I told them I didn't know of anything that happened.

[248] Q. Other than them indicating or asking questions about a rape that occurred, any other information that they supplied you or asked you about?

A. Well, I kept on telling them that I didn't know anything about a rape case and they kept on—Investigator Malugani insinuating that I did know something about it and I kept on telling him I didn't and everything and after I kept on telling him I didn't know anything he started getting a little loud with me.

Q. Are you saying that Officer Malugani raised his 'voice?

A. Yes, sir.

Q. Do you recall what if anything he stated to you when he raised his voice?

A. At one point he told me he had ten more years on the force and if it took him that ten years he was going to prove that I committed this crime.

Q. And this occurred the afternoon of July the 27th at the Riley County Police station in the interview room?

A. Yes, sir.

Q. Was Officer Johnson present when he said that or not?

A. Yes, sir.

Q. Did you make any type of admissions to either Officer Johnson or Malugani on July 27th, 1981?

A. No, sir.

Q. After they interviewed you for a period of time what then [249] occurred?

A. Well, after I kept on telling them I didn't do anything they asked me if I would sign a waiver of search and I said, yes.

Q. And did you sign one of those?

A. Yes, sir.

Q. Do you recall about what time it was?

A. I don't remember exactly, but I would guess around 5:30.

Q. Okay, does this look like the waiver that you signed for that search?

A. Yes, sir.

Q. And do you recognize your signature on that?

A. Yes, sir.

Q. And what time does it indicate that you initially or actually signed the waiver of search?

A. 1748 p.m.

Q. That would be 5:48 in the afternoon?

A. Right,

Q. And does this waiver of search indicate abort when the search was actually conducted or started?

A. 1848 p.m.

Q. That would be 6:48, same day, July. 27?

A. Yes, sir.

Q. And does it indicate on the State waiver we're talking about here the time that the search was completed?

[250] A. 1906.

Q. That would be 7:06 p.m.?

A. Yes, sir.

Q. After you signed this waiver of search, what happened?

A. They took me out of the interview room and took me back to Ogden and proceeded on with the search.

Q. And do you recall what if anything either police officer Malugani or Johnson obtained as a result of this search on July 27th?

A. First they searched my car and took out a brown handled knife out of the—where the tire sits in the back of the car and then they went inside my trailer and took, they asked me where were the pants that I was wearing that night so I took them to the bedroom and gave them the pants.

Q. This knife that they found in your car, do you recall why that knife was there or how it got there?

A. I'd been putting in speakers earlier, I'd say about a month before that or so and I had spliced some wires and used the knife and must have left it in there or something.

Q. And those pants that the police officers obtained on July 27th, you're stating that those were the pants that you were wearing on July 26th when you were involved in that car accident?

A. Yes, sir.

[251] Q. After this search was completed, what then happened?

A. They asked me if I could come back the next day at 8:00 o'clock in the morning and I told them yea.

Q. And at any time while you were with either police officer. Johnson or Malugani were you ever told, that you were under arrest?

A. No, sir.

Q. Did you at any time during that day when you were with police officers request an attorney?

A. No, not on the 27th, no.

Q. Let's switch over now to July 28th, all right. Do you recall what happened after you woke up on July 28th?

A. When I woke up I went to a friend's house to see if I could borrow his car to go down to the police station but he had already left for work so I came back to my trailer and called Investigator Malugani and told him I didn't have no way in so he said he'd come back and pick me up.

Q. Did he do that?

A. Yes, sir.

Q. Do you recall what time it was when Officer Malugani picked you up on July 28th?

A. I believe it was about 8:20 or 8:25,

Q. Was anyone else with him when he picked you up?

A. No, sir.

[252] Q. Do you recall when you were picked up at that time if you were placed under arrest?'

A. Nor sir.

Q. After he picked you up, Officer Malugani picked you up on July 28th, where did you go?

A. I went to the Riley County 'Police Department and they put me again in another interview room.

Q. And is this interview room on July 28th similar to the one you just described that you were in on July 27th?

A. Yes, sir.

Q. And do you recall who was present in thee interview room when you first arrived at the police department?

A. Officer Malugani and Officer—Officer Malugani came in there and then Officer Johnson came in with another Miranda warning.

Q. And what happened after they came in with the other Miranda warning' you testified to?

A. He asked me to sign another Miranda warning.

Q. Do you recall if the Miranda rights were read to you that day?

A. Officer Malugani read them off his card.

Q. And after he read those rights off the card then what did you do?

A. Then. I signed the Miranda warning.

Q. This is State's exhibit number 19 I'm handing you, is this [253] the waiver of Miranda right form that you signed on July the 28th?

A. Yes, sir.

Q. Is that your signature on there?

A. Yes, sir.

Q. And what time approximately did you sign that waiver?

A. 8:51 hours.

Q. That would be 8:51 in the morning of July 28th?

A. Yes, sir.

Q. After you signed this waiver of rights on July 28th, what then happened?

A. Officer Malugani stayed in the room and. Officer Johnson left and Investigator Malugani was asking me questions about do I remember any more about what we were talking about yesterday and I. said no and then he told me that he thinks that I'm the one that committed this crime and I kept on saying I don't have nothing to do with it and I never did from the starting of this.

Q. All right. After Officer Malugani talked with you, what happened?

A. After he got done talking to me and everything I requested for a lawyer. I asked if I could see a lawyer and then he said, he goes, "Well, there's no

need for a lawyer right now because all we want to do is find out some questions from you I said okay.

[254] Q. So you're stating that you did specifically ask Officer Malugani to speak to a lawyer sometime in the morning of July 28th at the police station?

A. Yes, sir.

Q. Was anyone else present in the room besides you and Officer Malugani?

A. Just Malugani.

Q. All right after you stated that Officer Malugani refused to comply with your request to see an attorney, what happened?

A. He left me in the room and then later returned with Investigator Johnson and I went over and spoke to Office Raynor.

Q. Okay and how long did you talk with Officer Raynor?

A. From about 9:30 to about 12:30.

Q. And after you were through talking with Officer Raynor, what happened?

A. Officer Johnson and Officer Malugani came back where I was talking to Officer Raynor at and took me back over to the interview room on the other side of the station.

Q. After you were through talking with Officer Raynor did you request an attorney? Do you recall if you did or not?

A. After I talked to Officer Raynor?

Q. Yes.

[255] A. No, sir.

Q. After then being transported back over to the interview room in the administration building of the Riley County Police Department, what happened?

A. Officer—Investigator Malugani and Johnson started asking me questions about the rape again.

Q. At any time up to that time had either police officer offered you any food?

A. No, sir.

Q. Had you requested any?

A. No, sir.

Q. At any point up to that time had you been advised that you were under arrest?

A. No, sir.

Q. Then after this interview began again with Officer Malugani and Johnson the afternoon of July 28th, what happened during this interview?

A. Officer Malugani started asking me questions about the rape. He said, 'We think you have something to do with it." I kept telling them that I don't know what he's talking about. I don't have nothing to do with this rape and he kept on, "Well, c'mon Lowery, if you admit that you did this we'll get you proper help" and I go, "There's nothing wrong with me"; He kept on saying, "Well, we know you did this, Lowery. All you got to do is admit that you [256] did this and this whole thing will be over with."

Q. Do you remember any other questions or anything else than was asked of you during this interview?

A. Just that he kept on, you know, accusing me of committing this rape and I kept on telling him that I didn't do this and everything and he Just kept on telling me, "Well, admit that you did this, Lowery and we'll get proper help for you."

Q. This was Officer Malugani that did this?

A. Yes, sir.

Q. Was Officer Johnson in the room when this was going on?

A. Yes, sir.

Q. Can you describe how the tone of the voice or how this was handled by Officer Malugani, those questions?

A. You want me to say about how loud it was?

Q. That would be fine.

A. Malugani was saying, "C'mon, Lowery, admit that you did this." About that loud.

Q. And then finally after continually being questioned and the police officers asking you to admit what happened if anything?

A. After I kept on telling them I didn't do this and everything, I started getting really emotionally upset. I started crying and everything and I kept on trying to tell them didn't have nothing to do with it and he kept insinuating [257] that I did and at that time, you know, I was crying and I was upset and had my head hung down low. I was thinking of my sister. I had a sister that was raped just a year and-a-half ago and I was thinking, of her at the time and now these people were accusing me of raping somebody.

Q. Do you know if the police officers Malugani or Johnson were aware that your sister had been raped approximately a year and-a-half ago?

A. I told them.

Q. Did they in any way use that sort of thing in their questioning back to you?

A. It was only brung up one time. They asked me about my past history and when I was crying I brung up my sister that was raped and my brother that was killed.

Q. All right. Then what happened?

A. Well, after that, after I was crying and everything and really just couldn't—couldn't handle myself or anything, you know, and finally they wanted to hear a confession and everything so I just made up a concession and told them.

Q. The police officers both testified—this is Johnson and Malugani that you admitted that you were driving around in the early morning hours of July 26th and stopped at a home, I believe a white house on the corner?

[258] A. Right.

Q. Did you state that?

A. I told them that after I left the Mini-Mart, and everything I came back to my trailer and they said well, after you left the trailer you must have went up to somebody's house and I said no, I went and got in my accident and it came to a point where finally I told them okay, you want to hear them—I told them I stopped in front of somebody's house.

Q. You're stating then that you never admitted that you stopped at a white house on the corner?

A. No, as a matter of fact, I never knew the house was white until this trial.

Q. After you stated that you were driving, you made this admission that you were driving around and then stopped at this house, what then did you recall stating or how did it go? How did the questioning go?

A. They asked me after you stopped at the house, what did you do. C'mon Lowery, tell us what happened and I told them I went to the front door.

Q. You said front door?

A. Yes, I said I went to the front door.

Q. Now as you recall you've been sitting here and both Officer Malugani and Johnson testified that you made admissions to them that you went to the back door?

[259] A. I never told them I went to the back door.

Q. You're stating that you told them you went to the front door?

A. That's what I told them on the 28th.

Q. Okay.

A. I told them I went to the front door and stopped again and I wouldn't say anything and he goes, "C'mon, Lowery, tell us what happened and we'll get' you help. How did you get in the house?" You know, "Did you cut the screen door or bust it open and pull the screen back?" So, I told him I busted the screen door down: with my hands.

Q. Again, you're stating that the information was presented to you that there was a screen, door that was broken into?

A. Yes.

Q. And you didn't volunteer the information about the screen door first?

A. No.

Q. All right. Then what happened?

A. Okay, after I told them I tore the screen door down I told them I busted the front door down and went inside the living room.

Q. Again, you are saying front door, right?

A. Yes, sir.

Q. Not back door as they testified?

A. No; front door. I told them I went into the living room [260] and proceeded into the kitchen and then they said, "Well what happened after that?" After I got to the kitchen I wouldn't say nothing else and everything and I was crying at the time. I didn't know what to say. I was scared.

Q. How did you come up with this, you stating that you went into the living room and then the kitchen?

A. Well, being that I don't know what the house looks like inside, I've never seen it in my life, I was using my own trailer because my trailer you go in the front door and there's a living room and then you go into the kitchen.

Q. And this is how you were stating to them you were going in the house based on the things of your own home? So you stated then that you told them that you went into the living room and then into the kitchen?

A. Yes.

Q. Then what happened?

A. They asked me, no, what happened, after that and everything and I didn't know what to say and he goes, "Did you hear a noise?" I go, "Yeah, I heard a noise." He goes, "Where did it come from?" I go, "Down the hall."

Q. Again, the information was brought to your attention about did you hear a noise, they asked that specifically of you?

A. Yes, they asked me if I heard any noises and I said, "Yes." I told them I went down a hall and stopped at a bedroom [261] door.

Q. And then what occurred?

A. Then I didn't say anything after that right then, you know. He just kept on going, "C'mon Lowery, you're almost there. Tell me the rest of it, what happened, admit that you did this and we'll get help for you." I didn't know what to do. I was all scared and everything and finally he goes, "Did you see anybody laying on the bed or anything?" He goes, "Did you jump on the bed or anything?" I said, "Well, I jumped on the bed."

Q. Who was asking that question of you?

A. Malugani was doing most of the questioning, asking me most of the questions.

Q. Again, you're stating that Malugani first brought to you attention or first brought forth the information or suggested to you about jumping on the bed?

A. Yes.

Q. And you did not bring that up on your own?

A. No. After I got to the doorway I stopped and didn't say anything after that and he kept on telling me what did you do after that. Did you jump on the bed or what and I told him, I go, "I jumped on the bed." And he goes, "What did you—the lady was hit, what did you hit her with?" I go, "I didn't hit her with anything." And he goes, "C'mon Lowery, you're lying, tell us the truth."

[262] Q. Then what happened?

A. He goes, "What did you do? Did you hit her with a vase or with the butt of a knife?" I said, "I hit her with the butt of a knife."

Q. Were you telling the truth or making up a story?

A. I was making up the story this whole time.

Q. Then what happened?

A. After I told him I hit her with the butt of a knife, you know, he just said, "Well, what happened after that?" I said, "Well, I raped her." I never said that, you know, I put the covers over her face or anything like that that I remember.

Q. Then after you stated to them that you raped her, what next?

A. I told them that I left the house.

Q. Do you recall or would you have any estimation on the time that lapsed during the period that you began making those admissions and the time you were finished with them?

A. I'd say it was about three hours because it took a—I wasn't saying anything for a while, you know, and it too. a long time for them to get me to say anything. After I'd say something, I'd stop and they'd tell me, "Well, c'mon, tell me this, tell me what happened", you know.

Q. During the period of time that you were making these admissions, do you recall how you were physically?

[263] A. I was—after I got back from talking to Officer Raynor after about 15 minutes and everything they kept on saying that I was the one that did this, "We know you're the one that did this." And I got really upset, you know, of someone trying to accuse me of raping somebody and every thing and I felt that I couldn't do nothing about it and I was upset and was crying and I had my head hanging down.

Q. Do you recall if you were crying before you began making these admissions or during or after?

A. Before. Just through the whole thing.

Q. And do you recall if voices were raised at all by the police officers during the period of time that you were making these admissions?

A. Malugani was always raising his voice at me, you know, kind of yelling at me saying, "Lowery, admit that you did this. You're almost there. We know you did this." Officer—Investigator Johnson really wasn't saying too much through the whole thing.

Q. Why did you make these admissions if you're stating in Court today that they were not true, is that right?

A. Yes, sir.

Q. Why then did you make these admissions to the police officers?

A. Because I felt that I couldn't leave and if I did leave [264] Investigator Malugani was just going to keep on getting all over me till he proved I was the one that did this or, you know, I just felt like I couldn't leave or anything.

Q. And by you making these admissions how did you feel that that would resolve that problem of not being able to leave or not?

A. I felt that they would throw me in jail and I could get me a lawyer and try to fight this case.

Q. After you made these admissions that you're testifying to today, that you're stating were not true, what happened?

A. After I—they took me back to my, well, I asked for a break and they gave me a 15 minute break and they brung in a cup of coffee and they came back about 15 minutes later and they asked me to write a statement out for the and they said, "If you don't want to write a statement, would you say it into a recorder if that would be easier and I told them I didn't want to say anything else, I wanted a lawyer and that's when they stopped asking me questions.

Q. After you, for the second time you stated the first time you asked for a lawyer it was refused by Officer Malugani?

A. He told me there was no need for one right. now.

Q. And the second time you asked for a lawyer was after you [265] already made this oral confession, is that correct?

A. Yes, sir.

Q. And you're stating then at that time they stopped questioning you?

A. Yes, sir.

Q. What happened then?

A. They took me back to my trailer back in Ogden.

Q. Do you recall if you were placed under arrest or advised you were under arrest at any time after the break?

A. I believe Officer Malugani placed me under arrest, I'm not quite sure if it was after the statement or after we got back from my trailer, I'm not too sure.

Q. What was the reason if you know why Investigator Malugani and Johnson wanted to go back to your trailer?

A. Pick up my shirt that I had on.

Q. And did you agree to that?

A. Yes, sir.

Q. Why did you agree to that?

A. I didn't have nothing to hide and everything and they asked me if they could get my shirt and I told them okay and we went back to my trailer and a girl that was staying at my trailer had it in the wash machine and I looked in the bathroom and I seen it in the washer.

Q. Were you the one that found the shirt or them?

A. I went in the bathroom and took it out of the washing [266] machine.

Q. And did you give it to the police officers?

A. Yes, sir.

Q. Do you recall what happened then after the police officers obtained your shirt?

A. They took me to Saint Mary's Hospital, took blood from me and then brung me back to Riley County Jail.

Q. And after you were brought back of the Riley County Jail what happened?

A. I was fingerprinted and photographed and placed inside a cell.

Q. During the day of July 28th while you were with Officer Malugani and Johnson you indicated that until you made that oral confession you were never advised that you were under arrest, is that correct?

A. Yes, sir.

Q. Why then prior to that time didn't you just ask for the questioning to stop?

A. I didn't—I just didn't think of it or anything because I told them, you know, they asked me to cooperate with them and everything would go a lot easier and that's whet, I was trying to do.

Q. And by cooperating what did you do?

A. I told them what they wanted to know, I told them that I wasn't doing this and everything and after a while they [267] just kept on insinuating that I did this crime and everything.

Q. Were you ever offered any food on July 28th at all by either officer?

A. No, sir.

MR. VOGEL: I have no other questions.

CROSS-EXAMINATION

BY MR. CAFFEY:

Q. Mr. Lowery, You're a high school graduate?

A. Yes, sir.

Q. So I presume then you do know how to read?

A. Yes, sir.

Q. I presume then that when the police officers informed you of your rights and gave you this form to read and sign you were in fact able to read that form?

A. Yes, sir, I read it.

Q. Are State's exhibits 18 and 19 identical with regard to the printed or typed portion on there?

A. Yes, sir.

Q. Pick one of those which ever you choose and could you read to me the portion right here, just read the whole portion.

A. If you decide to answer questions now without a lawyer present you will still have the right to stop answering [268] at any time. You also have the right

to stop answering at any time until you talk to a lawyer.

Q. You understand what that means don't you?

A. Yes sir.

Q. I take it you just didn't believe it?

A. At the time that I read that and everything they asked me if I would cooperate with them and I said okay. I signed those that morning.

Q. Well, let's go back and go through what you've testified to and I've got a couple more questions that I'd like to just elaborate on.

A. All right.

Q. On the 26th of July were you married or single?

A. Married.

Q. Were you separated from your wife?

A. Yes, sir.

Q. And you had indicated you were going down to the river just to think about the problems because of your separate on or what was that?

A. Yes, sir, I was going down to the river just to think about it, think about my separation is what it was.

Q. And you said that after this accident occurred—first of all you ran into this parked car?

A. Yes, sir.

Q. Cadillac?

A. I believe so. I don't know for sure.

[269] Q. Good sized Car?

A. I guess so.

Q. A little hard to miss, you say you just didn't see it?

A. Well, I wasn't expecting it to be parked on the side of the road.

Q. Which direction were you traveling?

A. I was traveling down.

Q. South?
A. South.
Q. This direction?
A. Yes, sir.
Q. Which side of the road was the car parked on?
A. On the right-hand side.
Q. So you ran into the rear of the car?
A. I hit the back of the ear, the left-hand side.
Q. Did you proceed on down the street a little ways after you hit it?
A. I kind of clipped the back of it and rolled in front of it.
Q. And you said you took your shirt off and threw it down. What was that, to prevent from betting blood on it or something?
A. I was bleeding on it and everything so I took it off and held it at my chin and put it down on the passenger side of the seat and I got out of the car.
[270] Q. I see. And then you had a conversation with the owner of that vehicle?
A. A slight conversation.
Q. A little heated conversation I believe you said?
A. Yes.
Q. Then you went to the Shatto's house?
A. Yes.
Q. And you said it was about an hour after the accident before the officer arrived, is that correct?
A. Yes, sir.
Q. I believe Mr. Shatto gave the estimate more like 15 minutes.
A. I don't know, I can't explain what he thinks.
Q. Did he as he said put coffee on?
A. I don't know. All 1 know is he offered me a bag of potato chips.
Q. Did you get a cup of coffee?
A. No I never had no coffee.

Q. Wasn't that like he said, the officer got there before the coffee got ready?

A. He never told me he was making any coffee, don't know.

Q. Do you know of any reason that he'd have to lie about?

A. No, sir.

Q. Isn't it true that when Officer Davis arrived at the scene and asked you and M. Adams about what happened you said [271] that the accident had occurred four or five minutes before the police were called?

A. No, sir, I don't think we said that.

Q. That's not true?

A. No, sir.

Q. He just dreamed that up?

A. I don't recall saying anything like that.

Q. You mean he dreamed that up?

A. He might have asked Mr. Adams or something but I don't recall talking to him about what time it happened because he was asking me to get my car out of the street.

Q. Do you remember him giving you some field sobriety tests?

A. Yes, sir.

Q. I assume he must have smelled alcohol on you?

A. Yes.

Q. Had you been drinking?

A. Yes, sir.

Q. The night before?

A. Yes, sir.

Q. Pretty heavily?

A. Well, not really that heavy.

Q. Enough so that you still had some on your breath though?

A. Right.

Q. Now on July 27th when Investigators Malugani and Johnson came to your house and, picked you up and took you to the [272] police department you were not under arrest, right?

A. No, sir.

Q. You were not handcuffed?

A. No, sir.

Q. In fact, after they got through talking to you they brought you back home, didn't they?

A. Yes, sir.

Q. You didn't have any reason to believe that they would not release you at your will, did you?

A. They said they were going to take me back home to search my car and my trailer and that's when they said they were going to leave me there.

Q. But they left you home, didn't they?

A. Yes.

Q. You didn't think you were under arrest, did you?

A. I didn't know what to think at the time.

Q. Well, now wait a minute, they took you home and left you at your house and you—

A. During the interview when they were question, me about this.

Q. Well, okay, after that you went home. Certainly at that point you had to know you weren't under arrest.

A. They told me they wanted to search my car and house a after they searched that—before that they never told me I was going to be arrested or I was arrested but after [273] they got done searching my car and my trailer they asked me if I'd come back the next day.

Q. But they left you at your house, didn't they?

A. Yes.

Q. They didn't haul you off to jail?

A. No.

Q. You didn't have to, post any bail or anything, did you?

A. Not that day.

Q. Now, you said they conducted a search of your car and your house and they got a brown handled knife and some pants, you gave them the pants apparently or at least you indicated to them that those are the pants you wore?

A. Right.

Q. Is that correct, this brown handled knife you said it's a steak knife?

A. Yes.

Q. Sharp?

A. I don't know. When they took it out of my car was the first time I'd seen it in a long time.

Q. It's got a point on it though, doesn't it?

A. Yes.

Q. And you said the last time you had seen it was when you were shaving some wires to put in speakers?

A. I was splicing wires, yes.

Q. So it was in the car proper, right? It wasn't, there's [274] no trunk in your car, is there?

A. There's a flat and then there's a tire.

Q. But you have access to that from inside the car, don't you?

A. Hatch back lifts open.

Q. Now, on the 28th of July, that morning you called the police department, did you not?

A. Yes.

Q. And you told them that you couldn't get a ride in and asked them to come out and pick you up instead?

A. Yes, sir.

Q. So they came and picked you up. Did any of them do anything to keep you from having breakfast? Couldn't you have had breakfast before they came to get you?

A. I woke up kind of late and they asked me to be in at 8:00 o'clock so I was running around to see if I could get a car borrowed and my friend had gone to work so I went ahead and called them.

Q. I assume it took them a little time after you called them to get out there?

A. About 20 minutes.

Q. You could have eaten during that time, you could have had a bowl of cereal, couldn't you?

A. I could.

Q. Then when you got back to the police department you were [275] again read your Miranda rights?

A. Right.

Q. You agree that they read them to you?

A. Right.

Q. And you again read this form?

A. Right.

Q. And signed it again?

A. Right.

Q. You said that on that morning you told—did you tell Investigator Malugani you wanted to talk to a lawyer or did you just say should I have a lawyer or what did you say?

A. After he questioned me a while I asked and he asked me to admit that I did this, I asked him if I could speak to a lawyer and he said no, there was no need for one right now because all they wanted to do is find out some questions from me.

Q. Than you went and you talked with Sergeant Raynor, is that correct?

A. Yes, sir.

Q. When you were talking to Sergeant Raynor did he tell you any of the facts about this case?

A. No, sir.

Q. He didn't tell you what kind of house the victim lived in or how entry was made or anything like that?

[276] A. No, sir.

Q. None of the facts at all?

A. No.

Q. Is it not true that Sergeant Raynor again read you your Miranda rights?

A. Sergeant Raynor?

Q. Yes.

A. Yes, I think he did. There was quite a few papers.

Q. You were not under arrest at that tine, were you?

A. No.

Q. Now then you came back and you talked with Investigators Johnson and Malugani in the afternoon and you say they didn't offer you any food but you didn't ask for any food either, did you?

A. No, sir.

Q. You didn't tell them. I'm hungry, I got to stop and eat?

A. No, sir.

Q. And you didn't ask them for a lawyer, you didn't say I want to stop this and talk to a lawyer or I want to go, et cetera?

A. I asked them for a lawyer before I went and talked to Officer Raynor.

Q. I'm talking about in the afternoon.

A. After I got done talking to Officer Raynor?

Q. Yes.

[277] A. No, I did not.

Q. And you, indicate that this entire confession that you gave was made up, sheer fabrication?

A. Yes.

Q. None of it was true?

A. No.

Q. No portion of it at all?

A. No.

Q. And you say that when investigators Johnson and Malugani testified that you went to the back door and made .entry through the back door of the victim's residence that that was a lie, that you didn't even ever say that?

A. I never said that. As a matter of fact I never said that and I never knew what color the house was and those two statements right there were never brung up until today.

Q. And when they say that you entered into the kitchen, that's a lie because you said you entered into the living room?

A. Right.

Q. And they're lying about that?

A. They must be, I don't know.

Q. And when they say that they never suggested any of the facts to you, that's a lie?

A. What?

Q. When they say that they never suggested any of the facts [278] to you about covering over her face or anything like that, that's a lie?

A. Malugani was suggesting it through the whole thing.

Q. He suggested that her face was covered over?

A. Yes.

Q. And then you said you covered over her face?

A. He said what did you do and I told him that I jumped on the bed and he goes, "Did you throw a pillow over her face or covers over her face" and I

said, "I threw covers over her face." And he suggested that, "Did you hit her with a vase or a knife?"

Q. Correct me if I'm wrong but it seems to me on your direct examination that you said and I copied it down, that you never said you put covers over her face.

A. Oh, well, he's the one that rung it up, he goes, "Did you throw covers over her face?"

Q. So you did say that after he suggested it?

A. I agreed with them.

Q. Well, now, I may be wrong but it seems to me like in your direct examination you said that you never even told them that you put covers over her face.

A. Right.

Q. And that's wrong, you did tell them that you did?

A. Yes.

Q. So you made a mistake on direct examination, is that right?

[279] A. I might have, yes.

Q. And after you made the admissions, did you go through them again the second time like they said or are they lying about that too?

A. I went through them again the second time.

Q. And did you tell the same story the second time you did the first time?

A. It wasn't as fast as they say it was.

Q. And then you asked for a coffee break?

A. After the confession, yes, I did. I. asked for a break.

Q. You asked for a break and they gave you a break, didn't they?

A. Right.

Q. They stopped asking you questions?

A. Yes.

Q. You had never asked for a break before that?

A. No.

Q. And then after this break they again informed you of your rights and then you asked for a lawyer and they stopped questioning you, right?

A. I asked for a lawyer after the break.

Q. And they stopped questioning you, didn't they?

A. Yes.

Q. Then you went to your trailer in Ogden, you agreed to go there and get the shirt out of the—Or you didn't know [280] where it was at the time you said but you went there and got it out of the—

A. Washing machine.

Q. Or the girl that was there got it out of the washing machine?

A. I got it out because no one was there.

Q. Well, didn't you before say that the girl that was staying there got it out of the washing machine?

A. No, I said she probably put it in the washing machine earlier that morning or something.

Q. I see. So, you got it out of the washer and gave it to them?

A. I gave it to Investigator Malugani.

Q. Then you went to Saint Mary Hospital?

A. Yes.

Q. And then you went back to the jail?

A. Yes.

Q. Or went back to the police department and were placed in jail?

A. Yes, sir.

Q. Fingerprinted and had your picture taken and all this any you were actually incarcerated?

A. Yes, sir.

Q. Did you have supper there at the jail there?

A. That evening, yes, I did.

[281] Q. So you were there before supper time in the jail before supper time?

A. I think they might have given me something that evening, I'm not for sure.

Q. If the police report indicated that or the arrest report indicated that you were returned there to the police department and taken over to the jail about 4:20 and were actually booked at 4:37, does that sound about accurate?

A. Yes, sir.

Q. So this whole chain of events from the time that you finished speaking with Sergeant Raynor and went over and were talking to Investigators Johnson and Malugani in the afternoon, about 12:45-1:00 o'clock, something like that, the whole thing was over by 4:37 including you actually being brought back to the jail and being fingerprinted and placed in jail, is that right?

A. Yes, sir.

Q. Were you not aware at the tine you made these statements to Investigators Johnson and Malugani that rape was a serious crime, a felony offense?

A. Yes, I knew that.

Q. Were you not aware that for the offense of rape you could be placed in prison?

A. Yes.

Q. And yet in order to escape the discomfort of being, of [282] talking to these two officers in this room the size of a bathroom you said—

A. About that size.

Q. You were willing to admit a rape that might place you in prison for a long period of time to keep from having to it there and talk to these two officers?

A. Well, at the time I was crying like I said before, I was crying and I was upset and I've never

been committed of any kind of criminal affair before and I didn't know how to take this whole thing.

Q. Well, when you asked for a break it was given to you, right?

A. After the end of the whole thing was, over with.

Q. But you didn't ask for it before, did you?

A. They kept on questioning me.

Q. You didn't ask at any time—

A. Hey, I'm—

THE COURT: The reporter cannot take it when you' both talking.

Q. Okay. Now, you didn't say to them, let's stop this, I'm upset, I want to stop and I want to take a break, you didn't ever say this to them, did you?

A. No.

Q. You didn't even think of trying that before you would confess to a felony offense of rape and felony offense of [283] aggravated battery and felony offense of aggravated burglary?

A. I was in such emotionally upset, I don't know what was wrong with me at that, time. I swear on that. I don't know because I would never rape no old lady. I've never hurt anybody.

MR. CAFFEY: I have no other questions.

RE-DIRECT EXAMINATION

BY MR. VOGEL:

Q. Eddie, you've previously testified that you requested an attorney prior to talking with Officer Raynor, is that right?

A. Yes, sir.

Q. And you're stating today that that request was refused by Officer Malugani?

A. I asked Officer Malugani if I could see a lawyer and he told me there was no reason for one right now all we want to find out is some questions from you?

A. Yes.

Q. So then you were refused a lawyer, they talked you out of it, didn't they?

A. Yes, sir.

Q. Then later that afternoon again you testified that you made certain admissions. This was done after a great deal of questioning, is that correct?

[284] A. Yes, sir.

Q. And you were upset at that time?

A. Yes, sir.

Q. Did you feel during this questioning while you were making these admissions that you could have said I don't want to talk any more, I want a lawyer and do you think that they would have done that since you stated previously you requested a lawyer and it wasn't granted to you?

A. No, sir, I felt that I was sitting there and I was crying and I was upset and trying to tell them that I didn't do this and they kept on saying that I did do this and they acted like they weren't going to let me go till they got something out of me.

MR. VOGEL: No further questions, Your Honor.

RE-CROSS EXAMINATION

BY MR. CAFFEY:

Q. Now you said when you asked Investigator Malugani for a lawyer he talked you out of it, he didn't say no, you can't have one, right?

A. He said there's no reason for one right now. All we want to do is find out some questions.

Q. And somehow you took that to mean that he would never give you a lawyer under any circumstances even if there might be a reason for one?

A. I figured that I couldn't get one after that.

[285] Q. You figured you couldn't get one?

A. Yes.

Q. Did he say to you, you cannot have a lawyer even though you want one you cannot have a lawyer?

A. He said that there's no reason for one right now, all we want to do is find out some answers from you.

Q. And after that were, you not again informed of your right-by Sergeant Raynor?

A. I was taken to Officer Raynor, yes.

Q. And did he not again inform you of your rights?

A. Yes.

Q. And did he not again inform you of your right to have a lawyer?

A. Yes.

Q. And at that time did you request to see a lawyer, did you request that of Sergeant Raynor?

A. No.

MR. CAFFEY: No other questions.

MR. VOGEL: No questions, Your Honor. I'd like to call Charles Adams to the stand please.

CHARLES ADAMS,

called as a witness in behalf of the defendant, being of legal age and having been first duly sworn, testified as follows:

DIRECT EXAMINATION

APPENDIX H

POLYGRAPH EXAMINATION LOG

VICTIM'S NAME	REQUESTING AGENCY	REQUESTING OFFICER	CASE NUMBER	TYPE CASE	TIME SPENT	RESULTS
RCPD - EdGar	RCPD	Wild	81-0017	Rape	1½	N.D.I.
RCPD - SHannon	RCPD	Wild	81-0018	Rape	2 hrs	N.D.I.
RCPD - Shilton	RCPD	Wild	81-0019	Rape	2 hrs	I
RCPD - Shelton	RCPD	Wild	81-0020	Rape	2 hrs	D.I.
RCPD - Chambers	RCPD	Wild	81-0021	Rape	2 hrs	N.D.I.
RCPD - Watson	RCPD	Gillespie	81-0022	DTP	3 hrs	D.I.
RCPD - Lowery	RCPD	Johnson - D	81-0023	Rape	3 hrs	D.I.
RCPD - Christmas	RCPD	Wild	81-0024	Rape	2 hrs	N.D.I.
RCPD - Hallon	RCPD	Wild	81-0025	Rape	2 hrs.	N.D.I
RCPD - Heath	RCPD	Hosler	81-0026	child abuse	2 hrs.	D.I.
RCPD - Burgh	RCPD	G Hon	81-0027	Theft	2 hrs	N.D.I.
RCPD - Lowry	RCPD	Mahaffey	81-0028	Theft	1 hr	[redacted] D.I. confession

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APPENDIX I

[100] the defendant, State's exhibits number 20 and 21 were collected one by Investigator—State's exhibit number 20 by Investigator Johnsen and Malugani, I believe and State's exhibit number 21 by Investigator Malugani and were given to Sergeant Myers and then delivered to the K.B.I. laboratory for examination.

MR. VOGEL: Your Honor, that is my understanding of our stipulation.

THE COURT: Thank you.

MR. CAFFEY: Call Mary Cortese.

MARY CORTESE,

called as a witness in behalf of the State, being of legal age and having been first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR CAFFEY:

Q. Would you state your name for the Court please?

A. Mary Cortese.

Q. And by whom are you employed?

A. I'm employed by the Kansas Bureau of Investigation.

Q. What it your job with the Kansas Bureau of Investigation?

A. My job is that of a criminalist.

Q, What does a criminalist do?

A. A criminalist is used for all of us employed in the laboratory and in my case I am assigned in the serology section which is the identification of blood and other body fluids [101] in any given case.

Q. What training have you had in that particular job?

A. I have a B.S. degree from the University of New Haven in West Haven, Connecticut. Previously to my employment here at the K.B.I. I worked for a six-month training period in the field of serology. I had a two-week period with the U.S. Army criminalistics laboratory in Fort Gordon in Georgia.

Q. And how long have you worked with the K.B.I.?

A. Since October of '79.

Q. And have you been in that particular position with the K.B.I. all that time?

A. Yes, I have.

Q. And you're currently employed by the K.B.I., is that correct?

A. Yes.

Q. I show you what has been marked here as State's exhibit number 6, can you look at that and identify it please?

A. Yes I can.

Q. What is it?

A. This is a—I believe it's a pillow that was submitted in the case.

Q. And how did you first get this pillow?

A. It was submitted through the agency, the Riley County Police Department at the bureau and I took it from the [102] evidence area, my evidence area of the custodial room.

Q. Describe this room for us, this custodial room.

A. It's a large room that has shelving units on it and each shelving unit is assigned to a particular examiner. When a case comes in and it's assigned to me, the evidence in that case will go on my shelf or my area.

Q. And then what do you do with the evidence?

A. I take it from that area and bring it down to the work area and downstairs in the laboratory and proceed to work on it.

Q. And you did this with this particular exhibit?

A. Yes.

Q. Could you open it up and take a look at the inside contents? Now what tests if any did you run on this particular item?

A. On this item I looked for the presence of both the presence of blood and seminal fluid.

Q. And what tests did you run in order to determine that?

A. I did chemical testing from—for the presence of blood.

Q. And how do you do the chemical testing for the presence of blood?

A. Once a stain is—if there were a stain here I would take a swab, try to pickup some of the stain and put my reagent on top of the area on the *swab* and look for a color reaction, color change.

[103] Q. And what would the color change be that would indicate blood?

A. In this case its a bluish-green color.

Q. And what does that indicate if you get the bluish-green color?

A. It indicates the presence of blood.

Q. Then what do you do after that?

A. I usually cut out the stain and go through the evidence. I go through each piece of evidence, finding my stains and cutting them out. From that step I do what's called precipitin test or the species identification trying to identify whether that stain is human or not human stain.

Q. Did you do that with this particular exhibit?

A. Yes.

Q. I see a place here that appears to have something cut out of. Is that where you cut out to run this test?

A. Yes.

Q. Did you cut anything else out of this pillow?

A. Yes, I did

Q. Now, there is another, two other places where there are cuts on the pillow, pillow case rather. Were those also places where you cut swatches out to run these tests?

A. On one of them there is a stain. On one of them there is no stain. On each item that I do, I cut out a sample [104] where there should be no blood stain to make sure there is no interferent substances on the item that are giving me a false positive test.

Q. And what were the results of those tests?

A. In this case it was blood and I did the species test and it was human blood.

Q. Did you run any other tests to determine blood type or anything of that nature?

A. Yes, I did.

Q. And what were those tests?

A. I did in this case enzymes which are proteins found in the red blood cells of your blood and I did a series of I believe five enzymes and they're multiple phenotypes oil as in the ABO blood type there is A, there is B, there is AB and there is O. In the enzyme there is also more than one type so we can determine whose type it is. In some of them there are three types and some of them there are five types and I did a series of these enzymes.

Q. In this particular case what were the results?

A. I'll give you the E.A.P. type and this was E.A.P. type AB.

Q. What does that mean?

A. It only is important when I have the two bloods I am running it against and when I run it against the victim's known blood and somebody else's blood who they suspect it [105] can be so that this way we put it in a category either being the victim's blood or someone else's blood.

Q. Did you have a sample of the victim's blood?

A. Yes, I did.

Q. I show you what's been marked here as State's exhibit number 16, can you identify that?

A. Yes, I can.

Q. What is that?

A. This is a vial of blood being identified as coming from the victim.

Q. When did you first see that?

A. I believe I saw it at the same time.

Q. The same time as you saw this other exhibit?

A. Same time I saw these other items.

Q. What tests, if any, did you run on that particular blood?

A. I—on this blood I did the same test. Naturally I didn't do whether it was human blood or blood but I did do the same enzyme testing and ABO blood typing on that item.

Q. What were the results of that test?

A. Well, I came up with what she was in each of the systems so that I can compare what the unknowns were on the pillow or any other items that was submitted.

Q. And when you made the comparison with the pillow and the tests that you ran on her blood sample, what were the results?

[106] A. That the blood from the pillow is consistent with being that of from the victim, the same types.

Q. This is based not only on the ABO typing but also on these enzyme test?

A. Primarily on the enzyme tests, yes.

Q. And I show you State's exhibit number 17. Can you look at that and identify it?

A. Yes, I can.

Q. What is it?

A. This is a tube of blood coming from, identified as coming from Eddie Lowery.

Q. And when did you first see it?

A. At the same time.

Q. And what tests did you run on it?

A. The same tests. I determined the ABO blood types and the enzymes of his blood.

Q. And from that did you determine whether this blood on the pillow was consistent with his blood type or consistent with the victim Arta Kroeplin's blood type?

A. The blood on the pillow was consistent with that of the victim.

MR. CAFFEY: Your Honor, at this time we would proffer State's exhibit number 6.

MR. VOGEL: No objection, Your Honor.

THE COURT: Wait a minute, number what, Mr. Caffey?

[107] MR. CAFFEY: Number 6.

THE COURT: All right. Thank you. No objection?

MR. VOGEL; No objection.

THE COURT: 6 will be admitted.

MR. CAFFEY: We also will proffer State's exhibits number 16 and 17.

MR. VOGEL: No objection.

THE COURT: 16 and 17 will be admitted.

Q. (By Mr. Caffey) I show you what has been marked here as State's exhibit number 7, can you look at that and identify it?

A. Yes, I can.

Q. What is that?

A. This is identified as being a bed sheet with blood stain on it.

Q. And when did you first see this particular exhibit?

A. Again, at the same time I ran the test, approximately the same time.

Q. Did you use the same procedure as far as getting it from your evidence room and returning it?

A. Yes.

Q. Could you open it up and look at the contents, please? Did you make some marks on there so you can identify it?

A. Yes, I did.

Q. Do you find those marks present?

[108] A. Yes.

Q. What tests if any did you run on this particular exhibit

A. On this exhibit I looked for the presence of blood and the presence of seminal fluid.

Q. What did you find?

A. In this case I found both blood and seminal fluid.

Q. How do you run your test for seminal fluid?

A. Primarily the same way. We look at the area and if we think it can be a seminal stain we cut it out and put a reagent on it. Of course, it's a different reagent than that of the blood.

Q. When you used that reagent you found the presence of seminal fluid?

A. We'll cut out that stain and do more testing to determine seminal fluid.

Q, Did you, in fact, do that in this case?

A. Yes, I did.

Q. Did you run any tests to determine anything about the seminal fluid such as the blood type of the person who deposited the seminal fluid there?

A. Yes, I did.

Q. How is that done?

A. That test is a test to determine what is known as the blood group substances and the secretions of a given individual. If this person is a secreter they will secrete [109] the same blood group substance, it's not the same chemical as that of your blood type but it is derived from the same thing and your own body fluids such as saliva or perspiration. For women, vaginal fluids and for men, seminal fluids so I determined what the blood group substance was.

Q. What was the blood group substance you determined?

A. To be that of H.

Q. And H would be secreted by what type of blood?

A. An O individual.

Q. Now what type of blood was Eddie Lowery's blood?

A. He was an O.

Q. Were you able to type the blood that you found on this particular sheet?

A. Yes, I did.

Q. Was that—whose, was that consistent with the type that you found for either the victim or the defendant?

A. Consistent with being that of the victims blood.

MR. CAFFEY: Your Honor, we offer State's exhibit number 7.

MR, VOGEL: No objection.

THE COURT: State's .7 will be admitted.

Q. (By Mr. Caffey) I show you what's been marked here as State's exhibit number 8. Can you look at it and identify it?
[110] A. Yes, I can.
Q. What is it?
A. It's identified as being a pillow case with a large blood stain.
Q. When did you first see it?
A. Again, at the same time in the same manner.
Q. Could you open it up and look inside, please? Do you have some marks on that?
A. Yes, I do.
Q. Are those marks still present that you placed on it?
A. Yes.
Q. What tests, if any, did you run on this particular exhibit
A. On this exhibit it was the identification of the blood stain.
Q. And what were the results of that test?
A. That the blood stain that was there was consistent with being that of the victim.
Q. Was any seminal fluid found on that?
A. No.

MR. CAFFEY: Your Honor, we offer State's exhibit number 8.

MR. VOGEL: No objection.

THE COURT; State's 8 will be admitted.

Q. (By Mr. Caffey) I show you what's been marked here as State's exhibit number 9. Can you look at it and identify [111] it?
A. Yes, I can identify it.
Q. What is that?

A. It's identified as being a bottom bed sheet.

Q. And how do you—when did you first see it?

A. Again, the same day in the same manner.

Q. And what tests if any did you run on it? Maybe you want to take it out and look at it first just to be sure.

A. On this item it was the identification of the seminal stains.

Q. What were the results of that test?

A. That the seminal stain was present and it was blood grout substance H.

Q. And again, that is consistent with what type of blood?

A. An O individual.

Q. Did you run any other tests?

A. Not on that item, no.

MR. CAFFEY: Your Honor, we offer State's exhibit number 9,

MR. VOGEL: No objection, Your Honor.

THE COURT: State's 9 will be admitted.

Q. (By Mr. Caffey) I show you what's been marked here as State's exhibit number 10. Can you look at that and identify it?

A. Yes, I can.

[112] Q. What is it?

A. Identified as being a mattress pad. cover.

Q. Did you see it again at the same time as the other items we've referred to here?

A. Yes.

Q. And did you follow the same procedures with it?

A. Yes.

Q. And what tests if any did you run on it?

A. On this item I looked for the presence of seminal fluid and the blood.

Q. What were the results of your tests?

A. There was no seminal fluid found and human blood was detected.

Q. Were you able to type that blood?

A. Not on this item, no.

Q. Now, what are some of the reasons that you might not be able to type blood on a particular exhibit?

A. In cases there can be insufficient amount of sample. If a blood stain has been washed first the detergent sometimes can break down some of the substances in the blood and give us inconclusive results.

Q. In this particular case which do you feel was the reason if you know?

A, I really don't know,

Q. Okay.

[113] MR. CAFFEY: Your Honor, we would offer State's exhibit number 10.

MR. VOGEL: No objection.

THE COURT: State's 10 will be admitted.

Q. (By Mr. Caffey) I show you what's been marked here as State's exhibit number 11, can you look at that and identify it?

A. Yes, I can.

Q. What is it?

A. This is identified as being a blue blanket from the seen.

Q. When did you first see it?

A. Again, the same time in the same manner.

Q. And what tests did you run on it?

A. On this I looked for the presence of seminal fluid and blood.

Q. Did you find seminal fluid on it?

A. Not on this item, no.

Q. Did you find blood on it?

A. Yes, I did.

Q. Did you run tests to determine whether it was human blood

A. Yes.

[114] Q. What was the result?

A. It was human blood.

Q. Did you run any tests to determine blood type?

A. Yes.

Q. What was the result of that?

A. That it was consistent with being that of the victims blood.

Q. What is her blood type?

A. Her blood type is A.

MR. CAFFEY: Your Honor, we would offer State's exhibit number 11.

MR. VOGEL: No objection.

THE COURT: State's 11 will be admitted.

Q. (By Mr. Caffey) T show you what's marked here State's exhibit number 12, Can you look at that and identify it

A. This is a nightgown that was taken.

Q. Can you look inside? What tests, if any, did you run on this nightgown?

A. The presence of seminal fluid and blood.

Q. That were your results with regard to the presence of seminal fluid?

A. That seminal fluid was present on this item.

Q. Did you run tests to determine enzyme types?

A. For the seminal fluid I did what's called the blood group substances and yes, I did find one.

Q. And what was that?

A. It was H to be consistent with an O individual.

[115] Q. Someone with O type blood would secrete this blood group substance H is that correct?

A. Yes.

Q. And, again, what is the defendant's blood type?

A. He is an O individual.

Q. Did you run tests to determine the presence of blood?

A. Yes, I did.

Q. And what did you find?

A. That blood was present, it was human blood and consistent with that of the victim's.

MR. CAFFEY: Your Honor, we would offer State's exhibit number 12.

MR.VOGEL: No objection.

THE COURT: State's 12 will be admitted.

Q. (By Mr Caffey) I show you what's marked as State's exhibit number 13. Could you look at that and identify it?

A. Yes, I can.

Q. What is it?

A. These are identified as being the vaginal swabs taken from the victim at the. time.

Q. You say "these", are you referring to both 12 and 13?

A. Yes.

MR. VOGEL: Excuse me, not 12.

MR. CAFFEY: Excuse me, 13 and 14, I'm sorry.

[116] Q. (BY Mr. Caffey) When did you first see these exhibits, 13 and 14?

A. At the same time.

Q. And again, did You follow the same procedures with regard to taking then from the evidence room and returning them.

A. Yes, I did.

Q. And what tests, if any, did you run on these items?

A. I ran a test looking for the identification of seminal fluid.

Q. What were the results of that test?

A. That seminal fluid was present.

Q. Did you run any other tests?

A. Yes, I tried to determine the blood group substances from the seminal fluid

Q. And what did you find?

A. In this case I found A and H blood group substances.

Q. And what's that indicative of?

A. An A individual and or an O individual together.

Q. Why would you find both?

A. In an A individual they will secrete their A blood type besides their O. O is considered to be the building block of AB and O so you would find the H that's consistent with the O there as well as there being the A since that's the type that the person is. In this case since we don't know where the H really came from so it can be from an O [117] individual as well as the contributor from the A person.

Q. In other words, this could have been from the victim as well as from the victim's vaginal fluid, is what you're saying?

A. Yes.

Q. So what you got there could be from the seminal fluid or from the victim's vaginal fluid?

A. A combination of the two is possible, yes.

Q. Okay. Now, were the tests consistent with that result or with the finding that it could be both the victim's vaginal fluid and the accused's seminal fluid?

A. Yes, since the item was positive for seminal fluid you have to bring the possibility in that it was from the O individual if the H is contributed from him.

Q. Okay.

MR. CAFFEY: Your Honor, we would offer State's exhibit number 13 and 14.

MR. VOGEL: No objection.

THE COURT: 13 and 14 will be admitted.

Q. (By Mr. Caffey) I show you what's been marked here as State's exhibit number 15. Can you look at that and identify it?

A. Yes, I can.

Q. What is it?

A. There is a saliva sample from the victim.

[118] Q. And what's the purpose of a saliva sample from the victim?

A. To determine whether she is a secretor or not.

Q, Now by secretor can you explain that to the jury?

A. The term secretor simply means one that sec'etes or has the same substance in their other body fluids as that of their blood. in the case of an O individual the blood group substance which is analogous on the blood types in the other body fluids would be found in her saliva or vaginal secretions.

Q. She, I believe you indicated was an A person, is that correct?

A. Yes, she is.

Q. Well, let's talk just about type A so we don't confuse the jury then. What substances would then be found in saliva an A individual if they're a secretor?

A. Blood group substance A since that's what the person is as well as the H.

Q. And is that what you in fact found in the saliva of the victim Arta Kroeplin?

A. Yes.

Q. Now, of what significance is this test when you look at it and you consider the results of your tests of the vaginal swabs?

A. That, I would interpret it to mean that the A and the H from the vaginal swabs, the A came from the victim herself [119] and the H could have come from an O individual.

MR. CAFFEY: We would offer State's exhibit number 15,

MR. VOGEL: No objection.

THE COURT: State's 15 will be admitted.

Q. (By Mr. Caffey) You indicated that the H could have come from an O individual. You're indicating there's some other possibility?

A, Well, the h is from the victim also, the A and H is from an A individual. As long as the seminal fluid is positive then you can attribute some of it being from the contributor of the seminal fluid.

Q. I see. I show you what's been marked here as State's exhibit number 20. Can you look at that and identify it?

A. Yes, I can.

Q. What is it?

A. It's identified as being a shirt.

Q. Can you open it up and look inside?

(The witness complied with the request.)

Q. When did you first see this item?

A. Again, it was the same time.

Q. Same time as all of the other items that you've referred to here?

A. Yes.

Q. What tests if any did you run on this item?

[120] A. I looked for the presence of blood on this item.

Q. What did you find?

A. That blood was present.

Q. Did you run any other tests?

A. Yes, I tried to determine whether it was human.

Q. And what was the result of that?

A. That it was human blood.

Q. Were you able to run, did you run a test to determine blood type or blood group substance?

A. I looked for blood type on this, yes.

Q. What was the result of that?

A. They were inconclusive.

Q. What do you mean by inconclusive?

A. That I was not able to put a type on this item.

Q. Do you know whether this item had been washed before you received it?

A. No, I don't know for a fact that.

Q. If it had been washed would that account for the inability to type the blood on it?

A. Yes, it can.

Q. And where was it that you took the blood, the sample for testing for blood?

A. Around the collar and shoulder area.

Q. Now, on the collar, you mean the front of the collar or the back of the collar?

[121] A. From the back of the collar.

MR. CAFFEY: Your Honor, we would offer State's exhibit number 20.

MR. VOGEL: No objection.

THE COURT: State's 20 will be admitted.

Q. (By Mr. Caffey) I show you what's been marked here as State's exhibit number 21. Can you look at that and identify it?

A. Yes, I can.

Q. What is it?

A. This is described as being a pair of men's pants.

Q. When did you receive it?

A. Again, at the same time.

Q. Can you look at those pants and determine what tests if any you ran on it?

A. On the slacks I determined whether it was blood.

Q. And what were the results of that?

A. That it was blood.

Q. And were you able to determine the blood type on these?

A. Yes, I was.

Q. What was that blood type?

A. That type was being that consistent of Lowery.

Q. Of the defendant in this case?

A. Yes.

MR. CAFFEY: Your Honor, we would offer State's [122] exhibit number 21.

MR. VOGEL: No objection.

THE COURT: State's 21 will be admitted. Ladies and gentlemen, are you cold or are you—I know those windows can get cold over there. Okay, fine.

Q. (By Mr. Caffey) Now what's the procedure, well, strike that.

MR. CAFFEY: I have no other questions at this time

CROSS EXAMINATION

BY MR. VOGEL:

Q. Would you have any idea what percentage of the population would have an O blood type?

MR. CAFFEY: Objection. No foundation.

THE COURT: In regard to that matter, at this time there's no foundation for an answer but I think he can lay a foundation possibly. We'll give him leave to do so.

Q. (By Mr. Vogel) Miss Cortese, would you explain to me and to the Court your experiences in blood typing and your education?

A. I have a B.S. degree in forensic science from the Univer situ of New Haven, West Haven, Connecticut.

Q. Did you study blood types?

A. Yes, we did.

Q. And was any of your training involved in studying the percentages of blood types in the population?

[123] A. Yes.

Q. And was this done throughout the courses that you received there?

A. Through some of them, yes.

Q. And what were some of the courses that you would have studied where you dealt with blood types and the percentages of the population that had those blood types.

A. I've had a hematology class, a serology and immunology class that would all be inclusive in the study of the percentages.

Q. And what other training have you had besides that?

A. At the bureau I've had a six-month training and the testing and procedures that were used at the Kansas Bureau of Investigation.

Q. Did you, in your personal experience deal with blood typing?

A. Yes, I did.

Q. And based upon your knowledge and the schools you attendee and your personal experiences, are you familiar with the percentage of the population that would have an O blood type?

A. Yes, I am.

Q. And what is that please?

A. Approximately 48 percent of the population.

Q. 48 percent?

[124] A. Yes.

Q. And again, based upon your education and training in blood typing did you study secretors, what was involved in secretors?

A. Yes, I did.

Q. And what type of training would you have had to become more familiar with whether an individual would secrete a certain blood group substance?

A. Again, the same courses at the university would deal in this and testings and procedures used at the bureau also.

Q. And in your courses that you have taken and in your experiences with the K.B.I. lab and any other experiences you might have obtained as a serologist, are you familiar with how much of the percentage of the population would be secretors?

A. Yes, I am.

Q. And what is that percentage?

A. Approximately 80 percent of the people.

Q. So if we were to take 80 percent which accounts for the number of secretors in the world population on an average and multiply that times 48 percent which you state are the number of people that have an O blood type we then would have the number of people that would have an O blood type that would be secretors, is that correct?

A. Yes.

[125] Q. And if my math is correct that would be 38.4 percent, does that sound accurate if my multiplication is correct

A. Yes.

Q. Therefore, in your testimony where you've stated that you have found O blood and that you tested a vial of blood taken from Mr. Lowery which was also O blood and also that you found an H blood group substance on cereal' of the items that you tested, this all together doesn't necessarily mean that Eddie Lowery was, in fact, the individual who secreted that seminal fluid on those items that you tested, is that correct?

A. That he is not that particular person, correct but also cannot eliminate him from leaving those stains.

Q. What were saying then is there are 38.4 percent of the people in the world that could have given you the same results as you obtained on these tests, is that correct?

A. Yes.

Q. So, when you do blood typing and tests for blood group substances this is not such an art yet that it can be individualized to one person, is that correct?

A. Correct.

Q. I believe you testified also that human blood was found on the shirt that you examined but the blood typing was inconclusive, is that correct?

A. Yes.

[126] Q. Does that mean that any blood that you did find on the shirt that you ran a test on was inconclusive then?

A. Yes.

Q. I believe you also indicated that you performed certain tests on a pair of pants and that you found that human blood was present and that the blood type was consistent with Eddie Lowery, is that correct?

A. Yes.

Q. Does your report or do you recall if you found any A blood which would be consistent with the victim Arta Kroeplin's blood on the pants that you examined and tested?

A. No, only that blood was found was determined to be from Eddie Lowery.

MR. VOGEL: No other questions, Your Honor.

RE-DIRECT EXAMINATION

BY MR. CAFFEY:

Q. As I understand your testimony then you're saying that the tests that you ran on the seminal fluid do not rule out the defendant Eddie Lowery?

A. That's correct.

Q. On the tests that you ran on the shirt of Eddie Lowery did not rule out the possibility that the blood on his shirt was the victim Arta Kroeplin's?

A. Well, my results indicate that it was inconclusive, I cannot [127] put any type on there at all.

Q. That's right so you can't rule out that the blood on his shirt was that of Arta Kroeplin's?

A. That's true.

MR. CAFFEY: No other questions.

RE-CROSS EXAMINATION

BY MR. VOGEL:

Q. Again, Your Honor, I'd like to clarify that by not rulin. out it's certainly inconclusive, it could have been any blood type, is that correct?

A. That's correct.

MR. VOGEL: Thank you.

THE COURT: May Miss Cortese be excused?

MR. CAFFEY: As far as I'm concerned.

THE COURT: Thank you very much and you may step down.

JOIN SHATTO,

called as a witness in behalf of the State, being of legal age and having been first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. CAFFEY:

Q. Mr. Shatto, could you state your name for the Court, please?

A. John David Shatto.

Q. And what is your address?

APPENDIX J

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS

Case no. 04-CV-3101-JTM

EDDIE JAMES LOWERY
AND AMANDA MARIE LOWERY,
Plaintiff,

v.

THE COUNTY OF RILEY; RILEY COUNTY BOARD OF COMMISSIONERS in their official capacities; RILEY COUNTY LAW ENFORCEMENT AGENCY ("LAW BOARD"); RILEY COUNTY LAW ENFORCEMENT DEPARTMENT a.k.a. RILEY COUNTY POLICE DEPARTMENT ("RCPD"); THE CITY OF MANHATTAN; MANHATTAN BOARD OF CITY COMMISSIONERS in their official capacities; THE CITY OF OGDEN; OGDEN BOARD OF CITY COMMISSIONERS in their official capacities; WILLIAM "MIKE" WATSON, in his official capacity, ALVAN JOHNSON, in his official and individual capacity, LARRY WOODYARD, in his individual capacity, STEVEN FRENCH, in his individual capacity, HARRY L. MALUGANI, in his individual capacity, DOUGLASS JOHNSON, in his individual capacity, ALLEN REYNOR in his individual capacity and JOHN DOES 1-10, police officers and non-uniformed employees of the Riley County Law Enforcement Department, in their individual capacities; RICHARD ROES 1-10, supervisory police officers of the Riley County Law Enforcement Department, in their individual capacities.

Defendants.

FIRST AMENDED COMPLAINT, DESIGNATION OF PLACE OF TRIAL AND JURY TRIAL DEMAND

Plaintiffs EDDIE JAMES LOWERY and AMANDA MARIE LOWERY, through their attorneys, the law firms of Cochran Neufeld & Scheck, LLP and Clark & Kellstrom, Chtd. states as follows:

INTRODUCTION

1. Plaintiff EDDIE JAMES LOWERY was unconstitutionally arrested, prosecuted and convicted and spent more than ten years suffering in state prison for a rape, aggravated battery and aggravated burglary that he did not commit. This gross miscarriage of justice was brought about by egregious misconduct of law enforcement officers, who fabricated false statements attributed to Mr. Lowery which he had never uttered, in a manufactured police report; by lying to conceal the fabricated, false nature of this evidence during testimony at preliminary hearings and trial; fabricating and coercing a false confession by denying Mr. Lowery access to an attorney, feeding him additional facts, and attributing them to Mr. Lowery; and by concealing the true nature of this evidence from prosecutors and the defense. More than ten years after his October 1991 parole, on April 3, 2003, Judge Meryl Wilson of the District Court of Riley County vacated the convictions and dismissed the charges finding Mr. Lowery "actually innocent" based on testing of DNA evidence by both law enforcement and independent laboratories that conclusively excluded him as the rapist.

2. When he was arrested on July 27, 1981, Mr. Lowery was a young man, serving as a clerk in the First and Sixty-Third Armored Division in the United States Army. By chance he was involved in a minor automobile collision in the neighborhood where a rape had occurred the same night. Riley County Police officers had no evidence, physical or testimonial, linking Mr. Lowery (or anyone else) with any crime. The victim of the rape could not describe her attacker's appearance at all.

3. Rather than properly investigating the crime to find the true attacker, who has never been found, Riley County police officers Harry Malugani and Douglass Johnson decided to fabricate false evidence against an innocent man, by trying to feed to Mr. Lowery, fact by fact, the confession that they wanted to hear based on details of how they knew or believed the crime occurred. After coercive treatment over a period of two days including multiple interrogations, lie detector testing, searches of his house, after being refused his request for an attorney, after not being given any food, and sleep deprived for two days, Mr. Lowery finally gave in and repeated what the officers told him to say so that he could leave. Mr. Lowery, however, refused to sign any written confession prepared by the officers.

4. Not content to stop there, these Riley County Police officers further embellished and fabricated additional false facts that they never had even fed to Mr. Lowery. This fabricated evidence was documented in a police report created three days after the coercive "confession." At

two preliminary hearings, at the first trial where the jury could not reach a verdict, and at a second trial at which Mr. Lowery was convicted, Riley County police officers provided false, perjurious testimony that Mr. Lowery, voluntarily and without being fed facts, gave details of how he committed the crime, including facts that only the perpetrator could have known. They suppressed from the defense and the prosecution that instead they had fed him facts and made up additional facts as part of their effort to fabricate and coerce a confession.

5. Mr. Lowery steadfastly maintained his innocence. Nevertheless, as a result of defendants' unconstitutional and tortuous conduct, Mr. Lowery was imprisoned for ten harrowing years, mostly at the Lansing Correctional Facility; Mr. Lowery was incarcerated upon his arrest, on July 27, 1981, through his January 7, 1982 conviction for rape, aggravated battery, aggravated burglary and sentence for eleven years to life, and until he was released in 1991 on parole only after having to agree to participate in sex offender treatment. Indeed, during more than ten years following his release in 1991, Mr. Lowery had to suffer the constant humiliation of having to report to the Sheriff's Department in Clay County, Missouri several times each year as a sex offender, and his name was published in a local newspaper as a sex offender.

6. After the law firm of Clark & Kellstrom, Chtd. and Innocence Project of Cardozo Law School became involved in the case, a clerk of the court discovered the biological evidence in this case in a corner of a courthouse vault. Addi-

tional biological evidence was later discovered in the custody of the Kansas Bureau of Investigation. In 2002, DNA testing on that evidence excluded Mr. Lowery as the source for semen found on the victim and bed sheets. Twenty-one years after Mr. Lowery's conviction, on April 3, 2003, upon Mr. Lowery's motion, joined by the State of Kansas, Judge Meryl Wilson of the District Court of Riley County dismissed the convictions and vacated the sentences on the basis of actual innocence.

7. Based on this DNA exoneration, we now know to a moral certainty that not only is Mr. Lowery innocent of the crime for which he served ten years in prison, but that he could not have "confessed" to the specific details of a crime that he did not and could not have known anything about. Only the real perpetrator and the police officers that were investigating the crime could have been privy to the non-public details that Riley County officers claimed he offered. The only way that Mr. Lowery could have uttered any details of the crime is that Officers Malugani and Johnson fed those facts to him. Indeed the officers fed Mr. Lowery certain facts, completely fabricated other admissions and then perjured themselves during preliminary hearings and during both of his trials.

8. Beyond compensating Mr. Lowery for the approximately ten years and three months that he spent in prison, and the additional ten years and five months he was wrongfully identified to the public as a sex offender, this action seeks to redress the unlawful Riley County policies, practices or customs that led defendants to vio-

late his constitutional rights as guaranteed by the First, Fourth, Sixth, Ninth and Fourteenth Amendments of the United States Constitution, and the laws of the State of Kansas.

JURISDICTION

9. This action is brought pursuant to 42 U.S.C. §§ 1983 and 1988, the Fourth, Fifth, Sixth, Eighth, Ninth and Fourteenth Amendments to the United States Constitution, and the laws of the State of Kansas. Jurisdiction is founded upon 28 U.S.C. §§ 1331, 1343, and 2202. Plaintiff further invokes the supplemental jurisdiction of this Court to adjudicate state law claims pursuant to 28 U.S.C. § 1367.

10. Venue is proper in this district under 28 U.S.C. § 1391(b).

THE PARTIES

11. Plaintiff Eddie James Lowery was at all times material to this complaint at the time of his arrest and conviction, a resident of the State of Kansas. He is now a resident of the State of Missouri.

12. Plaintiff Amanda Marie Lowery is the daughter of Eddie James Lowery and at all times relevant to this Complaint a resident of the State of California.

13. Defendant Harry L. Malugani is or was a member of the Riley County Law Enforcement Department ("RCPD"). At all times relevant to this complaint, he was a duly appointed and acting police officer of the RCPD with the rank of investigator, acting under color of law and in his individual capacity pursuant to the stat-

utes, ordinances, regulations, policies, customs and usage of Riley County and the State of Kansas.

14. Defendant Douglass Johnson is or was a member of the Riley County Police Department. At all times relevant to this complaint, he was a duly appointed and acting police officer of the RCPD with the rank of investigator, acting under color of law and in his individual capacity pursuant to the statutes, ordinances, regulations, policies, customs and usage of Riley County and the State of Kansas.

15. Defendant Alan Raynor is or was a member of the RCPD. At all times relevant to this complaint, he was a duly appointed and acting police officer of the RCPD with the rank of sergeant, acting under color of law and in his individual capacity pursuant to the statutes, ordinances, regulations, policies, customs and usage of Riley County and the State of Kansas.

16. Defendants John Doe, whose identities are currently unknown, represent those employees of the Riley County Police Department, acting in their individual capacities, and acting under color of law pursuant to the statutes, ordinances, regulations, policies, customs and usage of Riley County and the State of Kansas, who participated in the investigation that lead to Mr. Lowery's wrongful conviction.

17. Defendant Steve French is or was a member of the RCPD. At all times relevant to this complaint, he was a duly appointed an acting police officer of the Riley County Police Department with the rank of lieutenant, acting under

color of law and in his individual capacity pursuant to the statutes, ordinances, regulations, policies customs and usage of Riley County and the State of Kansas,who had supervisory authority over Malugani, Johnson, and John Doe police officers that participated in the investigation that lead to Mr. Lowery's wrongful conviction.

18. Defendant Alvan D. Johnson is or was a member of the RCPD. At all times relevant to this complaint, he was the director of the Riley County Police Department, acting under color of law and in his official and individual capacity pursuant to the statutes, ordinances, regulations, policies customs and usage of Riley County and the State of Kansas,who had supervisory authority over Malugani, Johnson, and John Doe police officers that participated in the investigation that lead to Mr. Lowery's wrongful conviction.

19. Defendant Larry Woodyard is or was a member of the RCPD. At all times relevant to this complaint, he was a duly appointed and acting captain of the RCPD with the rank Captain, acting under color of law and in his individual capacity pursuant to the statutes, ordinances, regulations, policies customs and usage of Riley County and the State of Kansas.

20. Defendant William "Mike" Watson, in his official capacity, is the duly appointed Director of the Riley County Law Enforcement Department and all powers which would normally be exercised by the Riley County Sheriff or by City Marshall, chief of Police or City Marshall of Police for all the cities located in Riley County

are vested and conferred upon the Riley County Law Enforcement Department director per Kansas law K.S.A. 194436.

21. Defendants Richard Roe, whose identities are currently unknown, represent those employees of the Riley County Police Department, acting in their individual capacities, and acting under color of law pursuant to the statutes, ordinances, regulations, policies, customs and usage of Riley County and the State of Kansas, who had supervisory authority over Malugani, Johnson, and John Doe police officers that participated in the investigation that lead to Mr. Lowery's wrongful conviction.

22. The County of Riley is a body corporate and politic empowered to exercise home rule. The Riley County Board of County Commissioners acting in their official capacity, is a duly designated policymaking entity for the County under Kansas law K.S.A. 19-101 et. seq.

23. Riley County Law Enforcement Department, also known as the Riley County Police Department ("RCPD"), is a duly designated law enforcement agency organized under Kansas Statutes Annotated § 19-4424-45 *et seq.*

24. The Riley County Law Enforcement Agency ("The Law Board") is a duly designated law enforcement agency organized under Kansas Statutes Annotated § 19-4424-45 *et seq* and is commonly known as the Law Board or the Riley County Law Board.

25. The City of Manhattan is a municipal corporation empowered to exercise home rule. The Manhattan Board of City Commissioners, acting

in their official capacities, is a duly designated policymaking entity for the city pursuant to Kansas law K.S.A. 12-1001 et. seq.

26. The City of Ogden is a municipal corporation empowered to exercise home rule. The Ogden Board of City Commissioners, acting in their official capacities, is a duly designated policy making entity for the city pursuant to Kansas law K.S.A. 12-10a01 et. seq.

27. Riley County, the City of Manhattan and the City of Ogden at all times relevant have delegated law enforcement and related policymaking powers to the Law Board, through enactment of a proposition all as authorized by K.S.A. 19-4424 et. seq.

FACTUAL BACKGROUND AND GENERAL ALLEGATIONS

28. In 1981, Eddie James Lowery was 22, serving as a clerk for the First and Sixty-Third armored division in the Unites States Army at Fort Riley, Kansas. He had a spotless military record. He had no prior criminal record aside from a misdemeanor for driving while intoxicated when eighteen years old. He lived in Ogden, Kansas, and was married but recently separated from his wife. He had a two year old daughter, Amanda Marie Lowery.

29. Arta Wright Kroeplin, was 74 years old, a white female who also lived in Ogden, Kansas. On July 26, 1981, early in the morning, she was asleep. An assailant gained entry to her house by cutting the screen door and then unlocking the screen door, opening the back door which was ajar, entering her bedroom, holding a knife

to her throat, covering her face, striking her head several times, raping her, penetrating and ejaculating. She called the police after her assailant left.

30. Riley County Police Department Officers Stanley Conkwright and an Officer Broussard then arrived, at about 3:30 in the morning. Kroeplin was taken in an ambulance to St. Mary's Hospital for medical assistance, where vaginal swabs were taken. The victim's bedding and nightgown were taken into evidence based on stains observed on each.

31. At the hospital, Officers Conkwright and Jennifer Malugani spoke to Kroeplin regarding the attack. Kroeplin could offer no descriptive details of any kind as to her attacker. According to his July 27, 1981 police report, Officer Conkwright asked, "Do you have any idea what race the man was?" Kroeplin responded, "No I don't have any idea." She stated she could not hear his voice, and that she had poor hearing so could not tell what he had said to her. She had no idea how tall he was, and as for his weight "he was just medium." Thus, the Riley County police had no description or any information at all about the attacker.

Riley County Officers Fasten Upon Lowery

32. Meanwhile, early in the morning of July 26, 1981 Lowery had several friends visiting for a late night party. Lowery left to go to the local Mini Mart a few blocks away at 1 or 2 a.m. to buy cigarettes. On the way back home, driving down his street, which was a dark street without street lights, he accidentally hit the back of

a parked car. He hit his chin on the steering wheel, and was bleeding badly. He wiped off some of the blood using his shirt as a bandage.

33. Charles Adams, who owned the car, called the police, around 3:25 or 3:30 a.m. Officer Davis from the Riley County Police Department finally arrived at about 4:00 am. Davis spoke to Mr. Lowery, and then brought him home to his trailer. Lowery's friend then helped Lowery push his damaged car back to his trailer.

The Fabricated "Confession"

34. The next day, July 27, a Monday, Lowery returned to work at the Army base, having had very little or no sleep. That afternoon, he received a message from Investigator Harry L. Malugani of the Riley County Police asking him to come to the police station to discuss the automobile accident. Lowery was cooperative, and agreed to talk to the officers. His car was still broken, so the police officers Malugani and Douglass Johnson brought him that afternoon to the police station in Manhattan, Kansas. There, he was taken to a small interrogation room where he spoke to Malugani and Johnson. At 4:30 p.m. he signed a Miranda waiver.

35. Upon signing that waiver, the officers immediately switched tacks, stopped discussing the automobile accident, and began to interrogate him regarding the rape of Kroeplin. Investigator Malugani informed Lowery that there was a burglary and rape in the neighborhood near his car accident at about the same time as the accident. Lowery repeatedly told them he did not know anything about a rape and stated that

he was at a party at home that evening. He said he thought they were going to ask him about the car accident. They continued to ask him questions about the rape, for two or three hours.

36. The officers repeatedly told Lowery that they thought he committed the rape. Lowery was never told he could leave and was never told that he was not under arrest.

37. Lowery throughout denied that he knew anything about any rape. Still cooperating as best as he could, at 5:48 p.m., Lowery provided a signed consent to a search of his car and the trailer in which he lived. Officers Malugani and Johnson took Lowery back home to Ogden and performed searches on his trailer.

38. Lowery was asked to come to the police department the first thing the next morning, at 8:30. Lowery's car was damaged, so the next morning, July 28, both Investigator Malugani and Johnson picked him up, and brought him to the police station. On the way to the police station, Malugani asked if Lowery had a good night's sleep, and Lowery told him that he did not sleep too much. In addition to not having had much sleep the past two days, Lowery had not eaten anything that morning.

39. Lowery was placed in a small interview room. Malugani and Johnson asked him to sign another Miranda waiver, and Lowery signed the waiver at 8:51 a.m.

40. For some time, Officers Malugani and Johnson began asking Lowery questions about the rape and telling him that they knew that Lowery

committed the crime and that they could prove that he committed the crime. Lowery denied repeatedly knowing anything about the crime. Lowery was not offered anything to eat.

41. Lowery then asked Malugani if he could see a lawyer. Malugani refused this request for counsel, and told Lowery that he did not need one because he was not under arrest and they just wanted to ask him some questions.

42. Lowery was then asked to take a polygraph test, which he agreed to do. He was taken to Sgt. Allen Raynor, who administered the polygraph test, according to his own report, from 9:45 to 12:45.

43. At the conclusion of the polygraph test, Lowery was told he had failed the test and that Sgt. Raynor believed he committed the crime. At this point, Lowery was exhausted from lack of sleep, from being grilled for hours during the polygraph examination, and because he was provided nothing to eat that day.

44. Sometime and around 12:45 or 1:00 p.m., the polygraph test was completed and Malugani and Investigator Douglass Johnson immediately met with Lowery in an interrogation room. They told him again repeatedly that they believed that he committed the burglary and rape. Malugani took the lead in the interrogation. Malugani repeatedly told Lowery to admit that he commit the crime. Malugani told Lowery that he should not have taken the polygraph, and suggested that the polygraph test had indicated Lowery was not being truthful. Malugani began raising his voice and stated, "he had ten

more years left on the force and if it took him the ten years *he* was going to prove that [he] caused these crimes."

45. After further interrogation in which the officers repeatedly told Mr. Lowery that they knew he had committed the crime and should confess, Lowery began to break down emotionally and was crying. He was particularly upset because, as he told the officers, his sister had been raped a year and a half before, and his brother had been killed, and he could never commit a violent crime like what he *was* being accused of. Lowery also believed that the officers would not let him leave the interrogation room unless he told them what they were demanding to hear, especially where his request for a lawyer had been refused. Again, Lowery was exhausted from the questioning, lack of sleep and he had still not eaten anything that day.

46. Due to the fact that Lowery had no involvement in the Kroeplin rape, he had no knowledge of the details of the crime. The officers proceeded to try to feed him details only known to the officers and the real perpetrator, fact by fact, and to coerce Mr. Lowery into accepting them.

47. The officers fed specific details to Mr. Lowery that they knew or believed to be true based upon their investigation of the crime thus far, including that the perpetrator:

a. entered the house with the intent to burglarize it;

b. "busted open" a screen door with his hands and went inside;

c. picked up a knife in the kitchen;

d. heard a noise, so walked down a hallway;

e. stopped at a bedroom door;

f. entered a room where he saw a person lying in a bed;

g. startled that person;

h. noticed that this person was wearing a nightgown;

i. jumped on the bed;

j. placed a pillow or covers over the person's head, when she began to sit upright;

k. struck the person with the butt of a knife;

l. noticed that the person was wearing underwear;

m. committed a rape.

48. Again, Mr. Lowery had no personal knowledge of any facts concerning the rape of Ms. Kroeplin, and no physical evidence tied him to the crime. The police officers Malugani and Johnson simply fabricated these statements by feeding to him certain facts of the crime and then lying in their written report and in numerous hearings under oath that Mr. Lowery had *volunteered* each of these distinctive facts with no prompting. Many of these facts Mr. Lowery did not even repeat back to the officers, but instead he simply nodded or verbally assented to their description of the crime.

49. Finally, Lowery asked for a break, and received a cup of coffee; he still had not been pro-

vided any food that day and had not eaten anything.

50. The officers returned and asked him to sign a written statement, or record a statement. Lowery refused to do either. He again requested to see an attorney, and a second time, he was refused access to an attorney.

51. He was then taken back to his trailer in Ogden, where the officer wanted to obtain the shirt that he was wearing the night of July 26, which he provided to them. The officers next took him to St. Mary's Hospital to take his blood. Because Mr. Lowery had never voluntarily confessed and his statements were fabricated, there was no probable cause to execute these searches.

52. Malugani next typed a written arrest report. That report, prepared at 4:20 p.m., falsely stated that "After subject Lowery was read the Miranda warning he admitted to the Aggravated Burglary, Aggravated Battery and Rape case 81-4777," and also that "Lowery was arrested on probable cause" and was booked in Riley County Jail. The officers then took Lowery to the Riley County Jail, where Lowery was fingerprinted, photographed and booked, at 4:37 p.m.

53. A supplemental report dated July 31, 1981, and signed by Johnson, stated in part:

> Upon questioning suspect Lowery indicated that in fact he had torn open the screen door of the victim's residence and pushed open inside door. The inner door had been unlocked and left ajar by victim Kroeplin prior to going back to bed.

Suspect Lowery stated upon entering the residence he picked up a silver kitchen knife and "rumbled" around inside the residence. Suspect Lowery indicated he then heard the victim stirring and found her lying in the bed. Suspect Lowery stated he was afraid she would wake up and see him so he covered her face with a pillow and jumped on top of her in bed.

Suspect Lowery indicated the victim was struggling and he hit her in the head with the handle of his knife.

Suspect Lowery indicated he then slid his pants off and pull the victim's gown off and then raped the victim Kroeplin.

Suspect Lowery stated he then threw the knife away inside the residence, fled to his vehicle and left the area.

The Ro's asked suspect Lowery to again tell the story and he did so with no change in the events or details.

54. The arrest was performed by Investigators Malugani and Johnson, without the benefit of an arrest warrant, and the "probable cause" determination made by such officers was based solely on the fabricated, coerced, and false confession, and false arrest report, and thus there was no probable cause for arrest.

55. Not only did the police report fail to mention that Mr. Lowery had simply repeated facts provided to him and volunteered none of this information, in addition, significant facts in the police report were false and were not facts that had even been fed to Mr. Lowery. The officers embellished their supplemental report

with new fabricated facts including that the perpetrator:

a. entered through the back door of the victim's residence;

b. "tore open" the screen door, and entered where the inner door had been left ajar;

c. "rumbled" around the house;

d. entered first the kitchen;

e. found a silver handled knife in a kitchen;

f. covered the victim's face with a pillow;

g. observed that the victim was struggling;

h. hit the victim with the handle of a knife on the head;

i. took off the victim's gown;

j. before leaving, threw the knife to the floor.

None of these facts were fed to Mr. Lowery or uttered by him during the interrogation, and all were totally fabricated by the defendant officers Malugani and Johnson.

56. Further, despite the fact the confession was coerced and fabricated and there was no other evidence linking Mr. Lowery to the crime, and despite the July 31 police report stating that the "investigation continues," upon information and belief, the officers failed to investigate other leads or suspects, and thus the true assailant remains unknown to this day.

Trial, Conviction, Incarceration

57. The first trial was held in November 1981. At that trial, the defendant made a motion to sup-

press the confession, which he alleged was coerced. The Court on Nov. 12, 1981 denied defendant's motion to suppress the confession. The first trial nevertheless ended in a hung jury on Nov. 19, 1981. A second trial was held on Jan. 5, 6, and 7, 1982.

58. During the suppression hearing and at trial, Lowery continued to maintain his innocence, and described how he repeatedly denied ever taking part in a rape, but that the officers fed him facts.

59. At the preliminary hearing on September 4, 1981, at the suppression hearing on November 12, 1981, and at trial, both Malugani and Johnson testified at length, falsely, that Lowery offered them information voluntarily, that they did not feed him information, and that the confession was not fabricated, further illustrating their bad faith. In doing so, Malugani and Johnson were complaining witnesses who actively instigated, initiated and perpetuated the prosecution of Mr. Lowery, by providing through their testimony the only significant evidence supporting probable cause.

60. Further, Malugani and Johnson added in their testimony still more new facts, which they falsely attributed to Mr. Lowery, that they had not fed to Mr. Lowery nor included in the supplemental police report, including that Mr. Lowery described:

a. driving up and parking by the side of a house in Ogden;

b. the house was white;

c. the house was on a corner;

d. entering by using his hand to tear open the screen door and reaching inside and lifting the latch to the screen door;

e. picking up a silver table knife, a dinner knife;

f. walking down a hallway

(or in Malugani's testimony a living room area);

g. being frightened that the woman would wake up and see him, so jumping on the bed;

h. striking the victim with the handle of the knife in the head several times;

i. describing that he "screwed" the victim;

j. leaving the same door that he entered.

These lies all exemplify their bad faith.

61. Although Mary Cortese of the Kansas Bureau of Investigation (KBI) Laboratory testified for the State concerning her serological testing, she concluded unremarkably that 38.4% of the people in the world including Mr. Lowery could have contributed seminal fluid found at the scene.

62. Thus, the only evidence suggesting guilt was the fabricated, false report and testimony of Officers Malugani and Johnson, and then unremarkable serological evidence which had very little probative value.

63. The second jury convicted Mr. Lowery on Jan. 7, 1982, finding him guilty of rape, aggravated

battery, aggravated burglary and Mr. Lowery was sentenced to eleven years to life in prison.

64. Lowery served approximately ten years and three months incarcerated; for about six months he was incarcerated at the Riley County Jail, and then after his conviction, he was transferred to the Lansing Correctional Facility, where he remained until his parole. He was paroled in October 1991, only after he finally agreed to confess in order to be eligible to complete a sex offender treatment program. Mr. Lowery had to suffer the indignity and humiliation, for ten years, of having to report to the Sheriff's Department in Clay County, Missouri several times each year to report as a sex offender; indeed in 2000 a local newspaper published his name as a previous sex offender. The conviction also caused him to have a dishonorable discharge from the military.

DNA EXONERATION

65. Mr. Lowery sought post conviction DNA testing, with the assistance of Barry Clark and the Innocence Project at Cardozo Law School. However, all of the biological evidence was feared to have been lost.

66. A clerk of the court, Lynda Wickstrum, made a heroic effort to search all of the courthouse storage areas; she finally found the "rape kit" in a corner of the courthouse vault, where it had been stored since trial. The Kansas Bureau of Investigation had retained other pieces of biological evidence from the case.

67. September 11, 2002 DNA testing by the Forensic Science Association, and corroborated by test-

ing performed by the Kansas Bureau of Investigation, excluded Lowery as the donor of the semen taken from the victim's body and the bed sheets.

68. Twenty-one years after his conviction, upon Mr. Lowery's motion, joined by the State of Kansas, Judge Meryl Wilson of the District Court of Riley County vacated the convictions and dismissed all charges on April 3, 2003.

69. The Court found that "It is impossible for the defendant to have committed the crimes with which he was convicted based upon the fact that a single assailant attacked the victim leaving semen on the bed sheets and within the victim's body and because the DNA testing has eliminated the defendant as the donor of the semen." The Court found that "[t]he defendant is actually innocent of the offenses with which he was charged and later convicted."

70. Thus, based on this DNA exoneration, we now know to a moral certainty that not only is Mr. Lowery actually innocent of the crime for which he served ten years in prison, but that he could not have "confessed" to a crime that he knew nothing about. Only the real perpetrator, and the police officers who were investigating the crime could have been privy to the details that Riley County officers claimed he offered. We now therefore know to a moral certainty that as Mr. Lowery testified all along, Officers Malugani and Johnson fabricated Mr. Lowery's confession, by feeding him facts one by one, and fabricating statements as to additional facts, fora crime he did not commit.

Systemic Violations at the Riley County Police Department

71. Upon information and belief, there was a custom, policy, pattern and practice in Riley County, and the RCPD, by and through its policymakers, beginning years before the unjust conviction of Mr. Lowery and continuing throughout his incarceration, of condoning, encouraging, ratifying and acquiescing in the fabrication of evidence, failing to investigate alibi evidence, failing to properly obtain probable cause, coercing of confessions, and failing to disclose exculpatory evidence and adequately investigate serious crimes, such as the rape of Ms. Kroeplin.

72. Upon information and belief, the RCPD and policymakers responsible for ensuring that defendant police officers received adequate training, policy and supervision, failed to do so in the areas of preventing involuntary confessions, fabrication of evidence, disclosure of exculpatory evidence to prosecutors, investigation of alibi evidence, and properly obtaining probable cause for arrest and for prosecution.

73. Upon information and belief, the RCPD, through its policy-makers failed to adequately screen, supervise, and/or discipline officers concerning proper investigatory techniques, obtaining statements from suspects, evidence collection, and Brady obligations. Indeed, upon information and belief, Inspector Harry Malugani was widely known by a nickname, "Dirty Harry," Johnson was referred to by a nickname "Maddog," referring to their abusive and coercive tactics that they would use upon civilians. Upon information and belief, Defendants Malugani and

Johnson were well known in the department for their abusive behavior, excessive drinking, and otherwise improper conduct botn on and off the job. Upon information and belief, although the supervisory defendants had actual notice of their notorious misconduct, they took no steps or grossly inadequate steps to discipline or supervise them.

74. Further, upon information and belief, despite Lowery's exoneration and the revelation that Riley County officers coerced him and fabricated a confession, the Riley County Police Department has been unwilling to reform its practices and the Department, for example, still does not require taped interrogations.

Notice of Claim

75. The Notice of claim required by Kansas state law was served on defendants and filed with the Clerk and/or governing body of each municipality named as a defendant herein. Such service and filing occurred on October 6 and 7th, 2003. The Notice of claim set forth the information required by K.S.A. 12-105b. More than one hundred twenty (120) days have passed since the filing of the Notice of claim and the defendant's have not approved the claim in whole or in part.

DAMAGES

76. This action seeks damages for the period from July 27, 1981 (the date of Mr. Lowery's interrogation) through the present. The defendants' unlawful, intentional, willful, purposeful, deliberately indifferent, reckless, bad-faith and/or malicious acts, misdeeds and omissions caused

Mr. Lowery to be falsely arrested, maliciously prosecuted, unfairly tried, wrongfully convicted, and to serve over five months in prison pending trial and ten years of wrongful imprisonment, and ten more years on parole or as a registered sex offender.

77. As a direct and proximate result of the acts of the defendants, the injuries and damages sustained by Mr. Lowery, arising from the deprivation of civil rights and claims of negligence, gross negligence, and negligent infliction of emotional harm include: violation of his clearly established rights under the Fourth, Fifth, and Fourteenth Amendments to the Constitution; personal injuries; pain and suffering; severe mental anguish; emotional distress; extreme fear; economic damages including loss of income; infliction of physical illness; inadequate medical care; humiliation, indignities, and embarrassment; degradation; injury to reputation; permanent loss of natural psychological development; and restrictions on all forms of personal freedom and physical liberty including but not limited to diet, sleep, personal contact, educational opportunity, vocational opportunity, athletic opportunity, personal fulfillment, sexual activity, family relations, reading, television, movies, travel, enjoyment, and expression. Furthermore, as a direct result of his unjust conviction and imprisonment, many of the effects of these disabilities continue to plague Mr. Lowery to this day.

78. As a direct and proximate result of the acts of the defendants, and the resulting unlawful incarceration of Mr. Lowery, plaintiff Amanda

Marie Lowery suffered pecuniary and non-pecuniary damages in that Ms. Lowery was deprived of those benefits one would normally expect to derive from the presence of her father, Mr. Lowery. Ms. Lowery suffered loss of society, companionship, advice, moral support, family services, attention, protection, parental care, financial support, mental anguish, bereavement and the stigma of being the child of a man who has been convicted and incarcerated for the reprehensible crime of rape.

79. All the alleged acts, misdeeds and omissions committed by the defendants described herein for which liability is claimed were done intentionally, willfully, purposefully, knowingly, unlawfully, maliciously, wantonly, recklessly, and/or with bad faith, and said proscribed conduct of defendants meets all of the standards for imposition of punitive damages.

CLAIMS FOR RELIEF

FEDERAL CAUSES OF ACTION

COUNT I

42 U.S.C. § 1983 FOURTEENTH AMENDMENT VIOLATIONS: FABRICATION OF INCULPATORY EVIDENCE, SUPPRESSION OF MATERIAL EXCULPATORY EVIDENCE IN VIOLATION OF *BRADY V. MARYLAND*, FAILURE TO INVESTIGATE, AND COERCION

A. Fabricating False Inculpatory Evidence

80. Mr. Lowery hereby incorporates by reference all of the foregoing and further alleges as follows:

81. Defendants Malugani, Johnson, Raynor and John Doe police officers, all state actors, acting deliberately, recklessly, or intentionally and under color of law, fabricated statements, including admissions attributable to Mr. Lowery, in police reports and in testimony, pretrial and at trial, concerning the precise details of the crime.

82. As a direct and proximate result of individual defendants' fabrication of this false inculpatory evidence, violating Mr. Lowery's clearly established Fourteenth Amendment due process rights including the right to a fair trial, along with his Fourth Amendment right to be free from unreasonable seizures, Mr. Lowery was wrongfully convicted and suffered the injuries and damages described above.

B. Failure to Disclose Exculpatory and Impeachment Evidence to the Prosecution

83. Defendants Malugani, Johnson, Raynor and unnamed police officers, all state actors, acting deliberately, recklessly, or intentionally and under color of law, failed to document or disclose to the prosecutors material exculpatory and impeachment information including, without limitation, that defendant officers fabricated statements, including admissions attributable to Mr. Lowery, in police reports and in testimony, pretrial and at trial, concerning the precise details of the crime.

84. By failing to disclose this information, defendant police officers violated the Fourteenth Amendment, as interpreted by *Brady v. Maryland*, 373 U.S. 83 (1963), *California v. Trom-*

betta, 467 U.S. 479 (1984), and their pre-1988 progeny, which imposed a clear duty on the defendants not to conceal or suppress obviously exculpatory evidence, and rather to report all material exculpatory and impeachment information to prosecutors.

85. Acting with recklessness, deliberate indifference, or intentionally by withholding this material exculpatory and impeachment evidence prior to trial, Defendants Malugani, Johnson, Raynor and John Doe officers violated Mr. Lowery's clearly established Fourteenth Amendment right to due process of law as interpreted by the United States Supreme Court in *Brady v. Maryland* and its progeny, undermining confidence in the outcome of the trial, and directly and proximately causing Mr. Lowery to be wrongfully convicted and to suffer the injuries and damages described above.

C. Failure to Investigate

86. Defendants Malugani, Johnson, Raynor and unnamed police officers deliberately, recklessly, or intentionally and under color of law further violated Mr. Lowery's Fourteenth Amendment rights by failing adequately to investigate the crime to seek out the true perpetrator, disregarding evidence indicating that Mr. Lowery was innocent and evidence pointing to other leads or suspects, and instead attempting to fabricate or coerce a confession.

87. The actions of the defendant police officers violated Mr. Lowery's clearly established rights under the procedural due process component of the Fourteenth Amendment, including his right

to a fair trial and caused his wrongful conviction and the injuries and damages set forth above.

D. Coercion

88. Defendants Malugani, Johnson, Raynor and unnamed police officers deliberately, recklessly, or intentionally, and under color of law further violated Mr. Lowery's Fourteenth Amendment right to a fair trial by compelling Mr. Lowery to make false inculpatory statements that repeated details of the crime that they had fed him and that were used against him during his criminal trial.

89. Introduction of those statements during trial violated Mr. Lowery's Fourteenth Amendment right to a fair trial, which bars introduction of statements obtained by use of means that violate Fifth Amendment right to be free from compelled self-incrimination. Such unconstitutional methods were employed here particularly where Mr. Lowery asked for an attorney on July 28, 1981, the defendants Malugani and Johnson refused to provide him one and instead continued the interrogation, and further searched his home and person, violating Mr. Lowery's clearly established right to counsel under the Fifth Amendment as set forth in *Miranda v. Arizona*, 384 U.S. 436 (1966) and *Edwards v. Arizona*, 451 U.S. 477 (1981).

90. The actions of the defendant police officers violated Mr. Lowery's clearly established rights under the procedural due process component of the Fourteenth Amendment and caused his

wrongful conviction and the injuries and damages set forth above.

COUNT II

42 U.S.C. § 1983: FOURTEENTH AMENDMENT VIOLATION: SUBSTANTIVE DUE PROCESS

91. Mr. Lowery hereby incorporates by reference all of the foregoing and further alleges as follows:

92. Although defendants Malugani, Johnson, Raynor and unnamed police officers knew or should have known that Mr. Lowery was not involved in the rape of Ms. Kroeplin, they fabricated statements, including admissions attributable to Mr. Lowery, in police reports and in testimony, pretrial and at trial, concerning the precise details of the crime, used coercive interrogation tactics in violation of his Fifth Amendment right to counsel and to be free from compelled self-incrimination, suppressed the exculpatory evidence that they had engaged in such wrongdoing, and failing adequately to investigate the crime to seek out the true perpetrator, disregarded evidence indicating that Mr. Lowery was innocent and evidence pointing to other leads or suspects, as set forth above.

93. These coercive and egregious acts shock the conscience, and/or were reckless and deliberately indifferent, violated Mr. Lowery's clearly established constitutional right to substantive due process of law as guaranteed by the Fourteenth Amendment and caused his wrongful conviction and the injuries and damages set forth above.

COUNT III

42 U.S.C. § 1983 FOURTH AND FOURTEENTH AMENDMENT VIOLATIONS: FALSE ARREST AND MALICIOUS PROSECUTION

94. Mr. Lowery hereby incorporates by reference all of the foregoing and further alleges as follows:

95. Defendants Malugani, Johnson, Raynor and unnamed police officers, all state actors, acting deliberately, recklessly and under color of law, falsely arrested and imprisoned Mr. Lowery, without probable cause or other legal justification, knowing that there was no physical or testimonial evidence connecting Mr. Lowery with the crime, and that they had fabricated statements including admissions attributable to Mr. Lowery in police reports and in testimony, pretrial and at trial, concerning the precise details of the crime, and where in fact Mr. Lowery was innocent of any crime. Thus, there was not even arguable probable cause to arrest or prosecute Mr. Lowery, and no reasonable officer would have believed probable cause existed.

96. Defendants Malugani, Johnson, Raynor and unnamed police officers, all state actors, acting under color of law, commenced and/or caused to be continued a criminal prosecution against Mr. Lowery that was lacking in probable cause, instituted with malice, by disregarding credible alibi evidence, suppressing exculpatory evidence, fabricating and coercing a false confession, failing adequately to investigate the crime and disregarding evidence indicating that Mr. Lowery

was innocent and evidence pointing to other leads or suspects, and the prosecution ultimately terminated in Mr. Lowery's favor, when through DNA testing he was exonerated.

97. The actions of the defendant police officers violated Mr. Lowery's clearly established rights under the Fourth Amendment and the procedural due process component of the Fourteenth Amendment, caused his wrongful conviction and the injuries and damages set forth above.

COUNT IV:

42 U.S.C. § 1983: SUPERVISORY LIABILITY

98. Mr. Lowery hereby incorporates by reference all of the foregoing and further alleges as follows:

99. Defendants Alvin D. Johnson, Lt. Steve French, and Captain Larry Woodyard and the Richard Roe supervisory police officers, all state actors, acting deliberately, recklessly and under color of law, were, at the relevant times, supervisory personnel with the Riley County Police with oversight responsibility for the training, hiring, screening, instruction, supervision and discipline of Malugani, Johnson, Raynor and John Doe police officer defendants who deprived Mr. Lowery of his constitutional rights.

100. These supervisory defendants knew or should have known that defendant officers were conducting false arrests and maliciously prosecuting civilians, failing to investigate evidence pointing to other leads or suspects, fabricating and coercing confessions, suppressing exculpa-

tory evidence, and depriving civilians of due process of law.

101. These supervisory defendants were personally involved in failing to take preventative and remedial measures to guard against such constitutional deprivations, such that Mr. Lowery would not have been injured. These supervisors knew or in the exercise of due diligence would have known that the conduct of the named and John Doe defendants against Mr. Lowery was likely to occur.

102. The failure of supervisory defendants to train, screen, supervise and discipline the named individual defendants and John Does amounted to gross negligence, deliberate indifference or intentional misconduct which directly caused the injuries and damages set forth above.

COUNT V:

42 U.S.C. § 1983: MONELL CLAIM UNCONSTITUTIONAL OFFICIAL POLICY AND FAILURE TO SUPERVISE AND TRAIN

103. Mr. Lowery hereby incorporates by reference all of the foregoing and further alleges as follows:

104. The County of Riley, the Riley County Board of Commissioners, the City of Ogden, the Ogden Board of City Commissioners, the City of Manhattan, the Manhattan Board of City Commissioners the Riley County Law Enforcement Agency and the Riley County Law Enforcement Department, by and through its policymakers, failed to ensure through custom, policy and/or practice that officers would conduct consti-

tutionally adequate investigations; never fabricate inculpatory evidence; obtain probable cause to ensure that suspects would not be falsely arrested and maliciously prosecuted; disclose to prosecutors material information favorable to criminal defendants; follow the duties imposed by *Brady v. Maryland*; and refrain from unconstitutional interrogation techniques.

105. The County of Riley, the Riley County Board of Commissioners, the City of Ogden, the Ogden Board of City Commissioners, the City of Manhattan, the Manhattan Board of City Commissioners, the Riley County Law Enforcement Agency and the Riley County Law Enforcement Department, and/or other final policymakers had actual or constructive notice of such failures to train, supervise and provide policy to its employees, and failed to provide training or supervision despite an obvious need that such training and supervision was required, where Defendants knew that it was foreseeable that officers would predictably confront these situations and as a result of the failure to train and supervise, constitutional violations would result.

106. The County of Riley, the Riley County Board of Commissioners, the City of Ogden, the Ogden Board of City Commissioners, the City of Manhattan, the Manhattan Board of City Commissioners the Riley County Law Enforcement Agency and the Riley County Law Enforcement Department, by and through their final policymakers, failed to adequately screen or discipline its employees, though it was foreseeable that constitutional violations of the type Mr.

Lowery suffered would be a predictable result of such failures.

107. The County of Riley, the Riley County Board of Commissioners, the City of Ogden, the Ogden Board of City Commissioners, the City of Manhattan, the Manhattan Board of City Commissioners the Riley County Law Enforcement Agency and the Riley County Law Enforcement Department, by and through their final policymakers, had in force and effect at the time of the conduct complained of, a policy, practice or custom of conducting constitutionally inadequate investigations; fabricating inculpatory evidence; failing to obtaining probable cause to ensure that suspects would not be falsely arrested and maliciously prosecuted; suppressing from prosecutors material information favorable to criminal defendants; failing to follow the duties imposed by *Brady v. Maryland*; and using unconstitutional interrogation techniques.

108. Such failures to supervise, train, discipline, and screen, and such unconstitutional municipal customs, practices and/or policies, amounted to gross negligence, deliberate indifference or intentional misconduct, and were the moving force behind plaintiffs arrest, prosecution, and incarceration, and proximately and directly caused the injuries and damages set forth above.

COUNT VI

42 U.S.C. § 1983: CIVIL CONSPIRACY TO VIOLATE CONSTITUTIONAL RIGHTS AGAINST ALL NAMED AND UNNAMED INDIVIDUAL DEFENDANTS

109. Mr. Lowery hereby incorporates by reference all of the foregoing and further alleges as follows:

110. The defendant officers, under color of law, entered an unlawful agreement with one another for the purpose of depriving Mr. Lowery of his constitutional rights to be free from unreasonable searches and seizures, false arrest, false imprisonment, malicious prosecution and the right to due process of law and fair trial.

111. In furtherance of the conspiracy, each defendant committed overt acts where they deprived him of procedural and substantive due process by deliberately or recklessly fabricating evidence, failing to investigate and suppressing exculpatory evidence, employing coercion, and they falsely arrested and maliciously prosecuted Mr. Lowery; all conduct that resulted in prejudice to plaintiff.

112. These acts caused Mr. Lowery to suffer the injuries and damages set forth above.

COUNT VII

§ 1983 AND PENDANT LOSS OF ASSOCIATION CLAIM BY PLAINTIFFS AGAINST ALL DEFENDANTS

113. Plaintiffs incorporate fully all of the foregoing as if set forth herein and further allege: Defendants' conduct undermined Amanda Marie Lowery's First and Fourteenth Amendment and

state law liberty interest in preserving the integrity and stability of the family relationship from intervention by the state without due process of law.

114. These acts caused Plaintiff Amanda Marie Lowery to suffer the damages set forth above.

STATE LAW CAUSES OF ACTION

COUNT VIII

MALICIOUS PROSECUTION

115. Mr. Lowery hereby incorporates by reference all of the foregoing and further alleges as follows:

116. Defendant police officers Malugani, Johnson, Raynor and John Doe officers initiated, continued or procured criminal proceedings against Mr. Lowery, without probable cause, with malice or specific intent to injure, and the proceedings ultimately terminated in plaintiffs' favor.

117. As a result of this malicious prosecution, Mr. Lowery sustained the injuries and damages set forth above.

COUNT IX

FALSE ARREST

118. Mr. Lowery hereby incorporates by reference all of the foregoing and further alleges as follows:

119. Mr. Lowery was unlawfully arrested by defendant officers Malugani, Johnson, Raynor and John Doe police officers, who took an active role, assisting, directing, or encouraging that arrest, without probable cause, and where no evidence

connected Mr. Lowery to a crime aside from the confession fabricated and coerced by defendant officers.

120. As a direct and proximate result, plaintiff suffered the injuries and damages set forth above.

COUNT X

ABUSE OF PROCESS

121. Mr. Lowery hereby incorporates by reference all of the foregoing and further alleges as follows:

122. Defendant police officers Malugani, Johnson, Raynor and John Doe officers made an illegal, improper, and/or perverted use of a lawfully initiated legal process which was neither warranted nor authorized by the process, with an ulterior motive or purpose, when they obtained an arrest and conviction of Mr. Lowery by use of a fabricated and coerced confession.

123. As a direct and proximate result of this abuse of process, Mr. Lowery sustained the injuries and damages set forth above.

COUNT XI

FALSE IMPRISONMENT

124. Mr. Lowery hereby incorporates by reference all of the foregoing and further alleges as follows:

125. Defendant police officers Malugani, Johnson, Raynor and John Doe officers falsely imprisoned Mr. Lowery by restraining him without legal cause, against his will and by using words or acts which the person being restrained is too afraid to disregard, in the course of refusing

him access to counsel, and coercing him to repeat facts fed to him and confess to a crime he did not commit.

126. As a direct and proximate result of this false imprisonment, Mr. Lowery sustained the injuries and damages set forth above.

COUNT XII

NEGLIGENT TRAINING, SUPERVISION AND ADOPTION OF POLICIES

127. Mr. Lowery hereby incorporates by reference all of the foregoing and further alleges as follows:

128. The County of Riley, the Riley County Board of Commissioners, the City of Ogden, the Ogden Board of City Commissioners, the City of Manhattan, the Manhattan Board of City Commissioners the Riley County Law Enforcement Agency and the Riley County Law Enforcement Department, and/or Riley County police policymakers, Alvan D. Johnson, Lt. Steve French, and Larry Woodyard the Richard Roe supervisory officers had a duty to properly train, supervise and provide adequate policies to prevent the above conduct, including fabrication of evidence, coercing a confession and suppressing exculpatory evidence, and negligently failed to provide such training, supervision and policies.

129. As a direct and proximate result of this negligent training, supervision and adoption of policies, Mr. Lowery sustained the injuries and damages set forth above.

COUNT XIII

NEGLIGENCE

130. Mr. Lowery hereby incorporates by reference all of the foregoing and further alleges as follows:

131. Defendant police officers Malugani, Johnson, Raynor and John Doe officers owed a duty to plaintiff, and breached that duty, by engaging in conduct including fabricating and coercing a confession to a crime Mr. Lowery did not commit, failure to investigate, suppressing exculpatory evidence, false arrest, and malicious prosecution.

132. As a direct and proximate result, plaintiff suffered the injuries and damages set forth above.

COUNT XIV

NEGLIGENT AND INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

133. Mr. Lowery hereby incorporates by reference all of the foregoing and further alleges as follows:

134. Defendant police officers Malugani, Johnson, Raynor and John Doe officers acted with intentional or in reckless disregard of Mr. Lowery, or with negligence, and their conduct in fabricating and coercing a confession to a crime Mr. Lowery did not commit, was extreme and outrageous and/or willful or wanton.

135. As a direct and proximate result, plaintiff suffered extreme and severe mental distress that no reasonable person should be expected to

endure, and the immediate physical injuries and other injuries and damages set forth above.

COUNT XV

KANSAS TORT CLAIMS ACT

136. Mr. Lowery hereby incorporates by reference all of the foregoing and further alleges as follows:

137. Defendants the County of Riley, the Riley County Board of Commissioners, the City of Ogden, the Ogden Board of City Commissioners, the City of Manhattan, the Manhattan Board of City Commissioners are liable under the Kansas Tort Claims Act K.S.A. 75- 6103(a) for damages caused by acts or omissions of employees acting within the scope of their duties who have committed negligent or wrongful acts or omissions, by improperly coercing a confession, fabricating evidence, suppressing material exculpatory evidence.

138. As a direct and proximate result, plaintiff suffered the injuries and damages set forth above

139. WHEREFORE, EDDIE JAMES LOWERY and AMANDA MARIE LOWERY prays as follows:

A. That the Court enter judgment in favor of Mr. LOWERY and Ms. LOWERY and against defendants on all Counts of the Complaint;

B. That the Court award compensatory damages to Mr. LOWERY and Ms. LOWERY and against the defendants, jointly and severally, in an amount to be determined at trial;

C. That the Court award punitive damages to Mr. LOWERY and Ms. LOWERYand against defendants, jointly and severally, in an amount to be determined at trial, in order that such award will deter similar proscribed conduct by defendants in the future;

D. That the Court award to Mr. LOWERY and Ms. LOWERYand against defendants prejudgment and post-judgment interest on all sums awarded them in this action and that it further award Mr. LOWERY and Ms. LOWERY recovery of their costs concerning this action, including reasonable attorneys' fees pursuant to 42 U.S.C. § 1988; and

E. That the Court grant Mr. LOWERY and Ms. LOWERY any such other relief to which they may be entitled.

PLAINTIFF DEMANDS TRIAL BY JURY

Plaintiff requests a trial by jury.

DESIGNATION OF PLACE OF TRIAL

Plaintiff designates Kansas City, Kansas, as the location for the trial in this matter.

Dated: October 21, 2004 Respectfully submitted,

EDDIE LOWERY

By:
s/ Barry A. Clark
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